Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations	**Just the Beginning Organization**

Recommenders

Mallory, Carol
c.mallory@northeastern.edu
6173735841

Adler, Libby
l.adler@northeastern.edu
617-373-7513

Sorokin, Leo
honorable_leo_sorokin@mad.uscourts.gov
617-748-9223

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Ingrid Vianna Sydenstricker
590 Centre St. Apt 7
Jamaica Plain, MA 02130

June 12, 2023

The Honorable Jamar K. Walker
Walter E. Hoffman U.S. Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

It is with great enthusiasm that I apply for a clerkship in your chambers for the 2024-2025 term. As a rising 3L at Northeastern University School of Law with a public interest background and litigation experience—including an internship with the Hon. Leo T. Sorokin at the District of Massachusetts—I believe I can make a meaningful contribution to your chambers and would greatly appreciate the opportunity to work with your team.

As a full-time judicial intern to Judge Sorokin last fall, I conducted legal research and wrote memoranda and opinions on a variety of legal issues ranging from a Social Security disability appeal to a motion for sanctions in an admiralty case. Following my internship, Judge Sorokin invited me to stay on for another semester both to help resolve complex motions involving rent control policies at a manufactured housing development and to serve as the teaching assistant for his course, Restorative Justice in Federal Court, at Boston College Law School. My time at the District of Massachusetts provided an unparalleled opportunity to hone my legal reasoning and writing skills, thus motivating me to pursue a year-long clerkship upon graduation where I can continue to do such engaging work.

Following my judicial internship, I have continued to work in litigation—supporting challenges involving Title VI, the Eighth Amendment, and various environmental statutes—through my work at Alternatives for Community & Environment and 80 Acres Law Center, two community-centered organizations tackling environmental injustice. In law school, I have built on these professional experiences by pursuing research opportunities such as work on the forthcoming book, *Legal Design: Dignifying People in Legal Systems* (Cambridge University Press), and my own independent research on the use of sanctuary jurisdictions to advance reproductive autonomy (manuscript in progress). Such experiences are a continuation of the work I did before law school, when I was an impact litigation paralegal at the ACLU responsible for managing dozens of cases including multiple class actions.

Beyond my professional experience, I believe that my background as a queer, first-generation Brazilian-American allows me to bring a unique and valuable perspective to the critical work of the judiciary. It would be an honor to join your chambers. Attached please find my resume, law school transcript and evaluations, writing sample, and letters of recommendation from Judge Sorokin, Professor Libby Adler, and Professor Carol Mallory.

Thank you for your time and consideration. Please do not hesitate to contact me at 607-227-7838 or sydenstricker.i@northeastern.edu for any further information. I look forward to hearing from you.

Respectfully,

Ingrid Vianna Sydenstricker

Ingrid Vianna Sydenstricker

sydenstricker.i@northeastern.edu · 607-227-7838 · 590 Centre St Apt 7 Jamaica Plain, MA 02130 · she/her

EDUCATION

NORTHEASTERN UNIVERSITY SCHOOL OF LAW Juris Doctor, Expected May 2024
Honors: Public Interest Law Scholar (full-tuition merit scholarship)
Activities: Latinx Law Student Association, Committee Against Institutional Racism, Student Conduct/Title IX Board
Research Assistant: NuLawLab (conducted research for a book on dignity in legal design)
Teaching Assistant: Hon. Leo T. Sorokin (Boston College Law), Legal Research & Writing (Fall 2023)

THE UNIVERSITY OF CHICAGO B.A. in Political Science with honors, June 2016
Honors: Humanitarian Award, University Scholar, Pozen Human Rights Summer Fellowship

LEGAL & POLICY EXPERIENCE

Alternatives for Community & Environment (full-time) Boston, MA May 2023 – Present
Legal Intern
Support litigation including a Title VI action to remediate landfill contamination in an environmental justice community (research the Resource Conservation and Recovery Act, conduct a fact-finding inquiry) and a land court zoning appeal challenging construction on a polluted site. Draft comments on regulations to reduce building greenhouse gas emissions.

80 Acres Law Center (part-time) Jan. – April 2023
Legal Intern
Supported environmental justice litigation and policy efforts by researching associational standing, protections against lead exposure, and the use of the Eighth Amendment to challenge the impact of climate change on incarcerated individuals.

U.S. District Court, District of Massachusetts (full-time) Boston, MA Sept. 2022 – Jan. 2023
Judicial Intern to Hon. Leo T. Sorokin
Conducted legal research, drafted memoranda, and wrote two full judicial opinions on issues such as: a Social Security disability appeal, a motion for sanctions in an admiralty case, a motion for judgment on the pleadings in a housing case, judicial recusal, executive removal powers, and implicit bias in juries. Supported court restorative justice programs.

Water Resources Institute, Cornell University Ithaca, NY Jan. 2020 – July 2021
Policy & Environmental Justice Analyst
Advised the NYS Department of Environmental Conservation on environmental justice issues and regulations, including how to make climate adaptation more equitable. Lobbied representatives for increased research funding and policies that advance water justice such as lead and PFAS protections. Supervised interns and ran programming on environmental justice.

New York Civil Liberties Union (ACLU of New York) New York, NY Mar. 2018 – Jan. 2020
Paralegal
Helped prepare filings for 30+ impact litigation cases in state and federal court. Managed client communication, organized case documents, and coordinated litigation with co-counsel, experts, and court clerks. Supported fact gathering, deposition preparation, and settlement negotiations. Answered daily immigration intakes. Conducted KYR and civic education trainings at schools and local jails. Developed language access protocols to ensure effective communication with all clients. Provided translation and interpretation. Served on the ACLU Latinx Employee Resource Group, NYCLU DEI Committee.

ACTIVITIES

Suicide Prevention & Crisis Services (Suicide Hotline) Jan. 2021 – Present
Provide crisis counseling to individuals experiencing mental health and other life crises as a counselor on the suicide hotline.

LANGUAGES Brazilian Portuguese (heritage speaker) · French (fluent) · Spanish (advanced) · Arabic (elementary)

INTERESTS Salsa dancing, community gardening, digital illustration, contemporary fiction

NORTHEASTERN UNIVERSITY

Northeastern University Registrar

Office of the University Registrar
230-271
360 Huntington Avenue
Boston, MA 02115-5000
email: transcripts@northeastern.edu web: http://www.northeastern.edu/registrar/

Record of: Ingrid E Sydenstricker NUID: 002120561
Issued To: INGRID SYDENSTRICKER
SYDENSTRICKER.I@NORTHEASTERN.E
REFNUM:07265466

Primary Program
Juris Doctor
College : School of Law
Major : Law

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
INSTITUTION CREDIT:						
Fall 2021 Law Semester (08/30/2021 - 12/22/2021)						
LAW	6100	Civil Procedure	5.00	HH	0.000	
LAW	6105	Property	4.00	H	0.000	
LAW	6106	Torts	4.00	H	0.000	
LAW	6160	Legal Skills in Social Context	2.00	HH	0.000	
LAW	6165	LSSC: Research & Writing	2.00	HH	0.000	
Ehrs:17.000 GPA-Hrs: 0.000 QPts: 0.000 GPA: 0.000						
Spring 2022 Law Semester (01/10/2022 - 05/06/2022)						
LAW	6101	Constitutional Law	4.00	H	0.000	
LAW	6102	Contracts	5.00	P	0.000	
LAW	6103	Criminal Justice	4.00	H	0.000	
LAW	6160	Legal Skills in Social Context	2.00	HH	0.000	
LAW	6165	LSSC: Research & Writing	2.00	HH	0.000	
Ehrs:17.000 GPA-Hrs: 0.000 QPts: 0.000 GPA: 0.000						
Summer 2022 Law Semester (05/09/2022 - 08/23/2022)						
LAW	7300	Administrative Law	3.00	HH	0.000	
LAW	7329	Environmental Law	3.00	H	0.000	
LAW	7443	Professional Responsibility	3.00	HH	0.000	
LAW	7488	Sexuality, Gender & the Law	3.00	HH	0.000	
LAW	7690	Intro Writing for Litigation	1.00	HH	0.000	
LAW	7978	Independent Study	3.00	HH	0.000	
Ehrs:16.000 GPA-Hrs: 0.000 QPts: 0.000 GPA: 0.000						
Fall 2022 Law Semester (08/29/2022 - 12/23/2022)						
COOP: U.S. Dist. Court, Dist. of Mass., Judge Sorokin Boston, MA						

********** CONTINUED ON NEXT COLUMN **********

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
LAW	7940	Reflections on Lawyering	1.00	HH	0.000	
LAW	7941	Pub Int Pub Serv Field Placemt	7.00	CR	0.000	
LAW	7964	Co-op Work Experience	0.00	CR	0.000	
LAW	7983	Human Rights, Earth Justice	2.00	HH	0.000	
Ehrs:10.000 GPA-Hrs: 0.000 QPts: 0.000 GPA: 0.000						
Spring 2023 Law Semester (01/09/2023 - 04/29/2023)						
LAW	7332	Evidence	4.00	HH	0.000	
LAW	7394	Land Use	3.00	HH	0.000	
LAW	7682	Hist Injustice and Reparation	3.00	HH	0.000	
LAW	7932	Public Service Externship Sem	1.00	HH	0.000	
Ehrs:11.000 GPA-Hrs: 0.000 QPts: 0.000 GPA: 0.000						
IN PROGRESS WORK						
LAW	7939	Public Service Externship	3.00	IN PROGRESS		
LAW	7978	Independent Study	2.00	IN PROGRESS		
In Progress Credits 5.00						
Summer 2023 Law Semester (05/08/2023 - 08/26/2023)						
COOP: Alternatives for Community and Environment, Inc. Roxbury, MA						
IN PROGRESS WORK						
LAW	7634	Energy Law and Policy	3.00	IN PROGRESS		
LAW	7966	Public Interest Co-op Work Exp	0.00	IN PROGRESS		
In Progress Credits 3.00						

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	71.000	0.000	0.000	0.000
TOTAL TRANSFER	0.000	0.000	0.000	0.000
OVERALL	71.000	0.000	0.000	0.000

********** END OF TRANSCRIPT **********

Rebecca Hunter Assoc VP & University Registrar

Northeastern University, Office of the Registrar
271 Huntington Ave.
Boston, MA 02115
SCALE OF GRADES AND COMMENTS TO ACCOMPANY TRANSCRIPTS

Effective Fall 2016: College of Professional Studies undergraduate programs converted from a quarter system to a semester system. For student records including hours earned prior to fall 2016, the credit hour conversion rate is as follows: QH x .75. For example a 4-credit quarter course is now equivalent to a 3-credit semester course.

Effective Fall 2009: Northeastern University converted its Student Information System. All courses and Programs were converted.

Northeastern University Course Numbering

UNDERGRADUATE

Orientation and Basic	**0001-0999**
No degree credit	
Introductory Level (First year)	**1000-1999**
Survey, Foundation and Introductory courses normally with no prerequisites and designed primarily for students with no prior background	
Intermediate Level (Sophomore/Junior year)	**2000-2999**
Normally designed for sophomores and above, but in some cases open to freshman majors in thedepartment.	
Upper Intermediate Level (Junior year)	**3000-3999**
Designed primarily as courses for juniors. Pre-requisites are normally required and these courses are pre-requisites for advanced courses.	
Advanced Level (Senior year)	**4000-4999**
Designed primarily for juniors and seniors, or specialized courses. Includes research, capstone and thesis.	

GRADUATE

Orientation and Basic	**0001-0999**
No degree credit	
1st level graduate	**5000-5999**
Courses primarily for graduate students and qualified undergraduate students with permission	
2nd level graduate	**6000-6999**
Generally for Master's only and Clinical Doctorate	
3rd level graduate	**7000-7999**
Master's and Doctoral level classes. Includes Master's Thesis	
Clinical/Research/Readings	**8000-8999**
Includes Comprehensive Exam Preparation	
Doctoral Research and Dissertation	**9000-9999**

Northeastern University Grade Scale

Letter Grade	Numerical Equivalent	Explanation
A	4.0	Outstanding Achievement
A-	3.667	
B+	3.333	
B	3.0	Good Achievement
B-	2.667	
C+	2.333	
C	2.0	Satisfactory Achievement
C-	1.667	
D+	1.333	
D	1.0	Poor Achievement
D-	0.667	
F	0.0	Failure
I		Incomplete
IP		In Progress
NE		Not Enrolled
NG		Grade not reported by Faculty
S		Satisfactory (Pass/Fail basis; counts towardtotal degree requirements)
U		Unsatisfactory (Pass/Fail basis)
X		Incomplete (Pass/Fail basis)
L		Audit (no credit given)
T		Transfer
W		Course Withdrawal

Course Comments

E	Course excluded from GPA
HON	Honors level course
I	Course included in GPA

LAW SCHOOL

CR	Credit
F	Fail
H	Honors
HH	High Honors
I	Incomplete
MP	Marginal Pass
P	Pass

Earned Hours

Northeastern University offers both quarter hour and semester hour programs.

Quarter Hours to Semester Hours Conversion Rate: For student records including quarter hours, the approved semester hour conversion rate is as follows: QH x .75. For example a 4-credit quarter course is equivalent to 3 creditsemester courses.

Northeastern University
School of Law
Co-op and Career Development

Northeastern University School of Law Grading and Evaluation System

A global leader in experiential learning for over 50 years, Northeastern University School of Law ("NUSL") integrates academics with practical skills as its core educational philosophy. To fulfill NUSL graduation requirements, law students must earn at least 83 academic credits and complete at least three terms of full-time, law-related work through "co-op," our unique Cooperative Legal Education Program.

Consonant with the word "cooperative," NUSL cultivates an atmosphere of cooperation and mutual respect, exemplified in our course evaluation system. NUSL faculty provide detailed feedback to students through narrative evaluations, designed to prepare law students for the practice of law. The narrative evaluations examine law student written work product, contributions to class discussions, results of examinations, specific strengths and weaknesses, and overall engagement in the course. Faculty also award the student a grade in each course, using the following categories:

- **High Honors**
- **Honors**
- **Pass**
- **Marginal Pass**
- **Fail**

A small number of courses are evaluated using a Credit/No Credit evaluation system, instead of a grade. NUSL does not provide GPAs or class ranks.

NUSL transcripts include the following information:

- The course name, grade received, and number credits earned;
- The faculty's narrative evaluation for the course; and
- All co-ops completed, and the evaluations provided by the co-op employer.

"In progress" notations on a transcript indicate that a student has not yet received an evaluation from faculty for a particular course.

Co-op Evaluation

Ingrid Vianna Sydenstricker

Fall 2022 : Ingrid E Sydenstricker - Fall 2022 Early (94720) (U.S. Dist. Court, Dist. of Mass., Judge Sorokin (Boston, MA))

EMPLOYER FINAL EVALUATION

Approve	Yes
Requested On	Dec 19, 2022 9:43 am
Student	Ingrid E Sydenstricker
Date Employed From:	September 6, 2022
Date Employed To:	December 16, 2022
Address	1 Courthouse Way, Suite 6-130, Boston, MA 02210
Employer Name	U.S. Dist. Court, Dist. of Mass., Judge Sorokin (Boston, MA)
1) Areas of law engaged in, and level of proficiency	Ingrid worked on legal issues spanning a broad range of subjects: a Social Security disability appeal; a motion for sanctions in an admiralty case; a motion for judgment on the pleadings in a civil case involving a manufactured housing development; implicit bias in jury selection; disclosures of funding for amicus briefs; judicial recusal based on a spouse's stock ownership; and restorative justice. In every instance, Ingrid efficiently produced thoughtful, helpful work product showing her understanding of the relevant facts and legal principles. She was one of the most prolific interns we have ever had in our chambers.
2) Skills demonstrated during the co-op	Ingrid's writing is clear and organized, whether conveyed via email summarizing research on a discrete question or in a more formal memo/draft opinion. She effectively conveys pertinent facts from the record, and her legal analysis is very strong. Unlike most interns of her experience level, she understands that it is not enough to cite a legal rule and then identify which party's position should prevail -- she explains why that conclusion follows from the rule by persuasively applying the law she has researched to the facts confronting the court. Most interns, and many term law clerks, give short shrift to that step in their written analysis. The strength of Ingrid's research and writing was apparent early in her co-op, and it quickly led the judge to rely more and more on her to work on discrete legal questions that arose often in time-sensitive contexts.
3) Professionalism, work ethic, and	Ingrid settled into our chambers team quickly and comfortably. She contributed to the work of chambers both in her written assignments in by participating in group

responsiveness to feedback	discussions of proceedings or issues. She welcomed assignments regardless of the topic, worked efficiently and independently, asked good questions, and was proactive about keeping all of us apprised of the status of her work. Ingrid welcomed feedback and successfully incorporated it not only when it was given but also in her writing moving forward. She is curious and thoughtful and sincerely interested in improving her writing and analysis to grow into a more effective soon-to-be lawyer.
4) Ability to work with colleagues and clients; ability to integrate knowledge from other disciplines	Ingrid was a delight to have in chambers. She engaged with the judge, me, the term law clerks, and other interns with respect and kindness, both professionally and personally. And she often contributed to conversations with her own life experience or knowledge from work and activities outside of chambers.
5) Further details about the student's performance	Ingrid is a star who ultimately performed more like an extra term law clerk than a student intern. She's one of the top 3 interns I have supervised in my ten years working for Judge Sorokin (plus 3 years working for other federal judges earlier in my career). The judge also places her among the top 3 interns he has encountered during his 17+ years on the bench. She so impressed him that he asked her to continue on a part-time basis to assist him with a restorative justice class he teaches in the spring at Boston College. Any employer, including any judge receiving an application from her for a post-graduate term clerkship, would be lucky to hire her.
Submitted by:	Amy Robinson
Date submitted:	December 19, 2022

Course Evaluations

Ingrid Vianna Sydenstricker

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Ingrid Sydenstricker
Exam #:	
Course Title:	Hist Injustice and Reparation
Course ID:	LAW 7682
Credits:	3
Term:	Spring 2023 Law Semester
Instructor :	Burnham, Margaret A.
Grade:	High Honors

Course Description:

Examines historical injustice and reparation with a focus on the Afro-diasporic experience.Explores the genealogy of reparation as a tool of law and politics and associated debates in law, political theory, ethics, and history. Considers themes such as the effect of the passage of time on claims; determination of who owes and who is owed; the responsibility of state and nonstate actors, collectives, and “implicated subjects”; the mechanics of reparations; and the role of state apologies, truth projects, and memory sites. Looks at the global movement to address slavery's legacy. Explores gendered practices, land redistribution claims, and design and implementation challenges. Uses case studies to deepen discussion and examine current movements for redress and reparation.

Performance Highlights:

You performed at the highest level in this course. One of the strongest students in the group, you lifted everyone's game. Your comments in class were astute, informed, and well articulated. Your oral presentation was strong and fascinating. Your paper is elegantly written, skillfully weaving climate justice, redlining, heat islands, and reparations concepts. The paper offers an important addition to the literature on reparations and historical disinvestment. It was a pleasure to have you in the course.

Date: 6.20.2023 5:10PM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Ingrid Sydenstricker
Exam #:	25239
Course Title:	Land Use
Course ID:	LAW 7394
Credits:	3
Term:	Spring 2023 Law Semester
Instructor :	Foster, Robert B.
Grade:	High Honors

Course Description:

A survey of legal doctrines, techniques and institutions relating to regulation of the use of real property. Topics covered include constitutional questions of takings by public agencies, the scope of the police power as it affects land use and the basic techniques of zoning and subdivision control. Students study, among other issues, recent cases on exclusion of low income housing, current techniques to encourage housing development (inclusionary or "linkage" regulations) and First Amendment questions arising from land use controls.

Performance Highlights:

You acquired a solid grounding in American land use law, including traditional Euclidean zoning and current trends in land use.

You made many valuable contributions in class discussions.

You demonstrated a strong and nuanced understanding of zoning law, and an astute analysis of the application of zoning law to emerging issues.

You prepared an excellent paper on the application of the public trust doctrine to protect biodiversity.

Date: 5.29.2023 3:43PM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Ingrid Sydenstricker
Exam #:	25239
Course Title:	Evidence
Course ID:	LAW 7332
Credits:	4
Term:	Spring 2023 Law Semester
Instructor :	Tumposky, Michael L.
Grade:	High Honors

Course Description:

This course examines how courtroom lawyers use the evidence rules to present their cases—notably, rules regarding relevance, hearsay, impeachment, character, and experts. The approach to the study of evidence will be primarily through the "problem" method—that is, applying the provisions of the Federal Rules of Evidence to concrete courtroom situations. Theoretical issues will be explored as a way to deepen the student's appreciation of how the evidence rules can and ought to be used in litigation.

Performance Highlights:

Your performance in the class was excellent. You have nearly mastered the Rules of Evidence. Great job!

Date: 6.2.2023 1:54PM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Ingrid Sydenstricker
Exam #:	24833
Course Title:	Human Rights, Earth Justice
Course ID:	LAW 7983
Credits:	2
Term:	Fall 2022 Law Semester
Instructor :	Segovia, Natali
Grade:	High Honors

Course Description:

In Defense of the Sacred: Human Rights, Earth Justice, and the Law Around the world, human rights defenders face great risks to protect sacred sites, ancestral lands, the Water, and the Earth from desecration by corporations and extractive industry. This course explores the role of law in the defense of defenders, fundamental human rights, and the Earth. We will review normative foundations including the role of treaties within the U.S. legal framework, and the complex tapestry of federal and international norms intended to protect Indigenous Peoples, Original Nations, and the Earth. Our case studies will highlight challenges and limitations of those protections. Ultimately, the course is an invitation to re-imagine the law as a vehicle for social change and lawyering as "relational" in tandem with communities working to protect the Sacred against environmental destruction.

Performance Highlights:

Highlights:

- Your reflections were analytically strong and beautifully written.
- Your insight added much to class participation.

Date: 5.8.2023 1:06PM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Sydenstricker, Ingrid
Exam #:	14044
Course Title:	Administrative Law
Course ID:	LAW 7300
Credits:	3
Term:	Summer 2022 Law Semester
Instructor :	Rosenbloom, Rachel
Grade:	High Honors

Course Description:

This course provides an introduction to the legal doctrines designed to empower and constrain government agencies and officials in their daily practice of governance. Topics include the constitutional status of administrative agencies, due process, the Administrative Procedure Act and the availability and standards of judicial review of agency actions. The course emphasizes the historical evolution of the modern administrative state and the regulatory agency's peculiar role in our system of governance.

Performance Highlights:

- Demonstrated a strong grasp of the Administrative Procedure Act and relevant Supreme Court jurisprudence
- Drafted an outstanding research memorandum analyzing the relationship between a regulation and its authorizing statute
- Demonstrated excellent research and writing skills
- Made frequent contributions to class discussions

Date: 10.6.2022 3:58PM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Sydenstricker, Ingrid
Exam #:	14044
Course Title:	Intro Writing for Litigation
Course ID:	LAW 7690
Credits:	1
Term:	Summer 2022 Law Semester
Instructor :	Leahy, Stefanie
Grade:	High Honors

Course Description:

Introduces students to litigation documents, including engagement and demand letters; complaints; answers; discovery requests (such as interrogatories, requests for the production of documents, and requests for admission); and motions. Considers audience, purpose, and components in drafting a document, taking into account relevant strategic considerations and general principles that apply to all litigation documents. Examines the protections associated with attorney-client privilege and attorney work product. Offers students an opportunity to review and draft a variety of litigation documents, to find and modify sample documents, and to find and apply the rules of the relevant jurisdiction.

Performance Highlights:

Over the course of two weeks, students in Introduction to Writing for Lit had the opportunity to work collaboratively with other students as well as discuss and draft a variety of litigation documents.

Ingrid was a frequent and vocal participant in class discussions, sharing perspective and knowledge from prior work experiences. She has well developed research and writing skills. She works incredibly well either independently or in small groups and consistently produces high quality work. Ingrid successfully produced a case brief related to the operation of the work product doctrine in MA courts, edited a Complaint, submitted “research request” supervisor emails, analyzed documents for privilege, and produced a tightly written Motion in Limine.

Considering the amount of work required in such a short period of time, Ingrid displayed excellent time management skills. She also demonstrated understanding of intricacies of the attorney client privilege and work product doctrine within the litigation space, which was a theme discussed throughout the two-week course. In the final reflection, Ingrid highlighted the takeaways from the course, including the importance of pre-writing preparation and centering the client in strategy decisions. Ingrid also understands the importance of recognizing how the big picture litigation strategy plays out more concretely through numerous smaller (but no less important) everyday decisions like how much specificity to put into a complaint or what questions to include in interrogatories.

Ingird is a highly competent student, and has every attribute to be an excellent litigator.

Date: 9.13.2022 7:04PM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Sydenstricker, Ingrid
Exam #:	14044
Course Title:	Sexuality, Gender & the Law
Course ID:	LAW 7488
Credits:	3
Term:	Summer 2022 Law Semester
Instructor :	Adler, Libby
Grade:	High Honors

Course Description:

This course uses case law and theory to address doctrinal problems and justice concerns associated with gender and sexuality. The syllabus is organized around notions such as privacy, identity and consent, all of which are conceptual pillars upon which arguments in the domain of sexuality and gender typically rely. Doctrinal topics include same-sex marriage, sodomy, sexual harassment, discrimination, among others, but the course is not a doctrinal survey; it is a critical inquiry into key concepts that cut across doctrinal areas. Students should expect to write a paper and share some of what they have learned with the class.

Performance Highlights:

You wrote an outstanding paper about the use of sanctuary cities to protect access to abortion. Your analysis demonstrated not only an impressive understanding of a broad array of doctrinal issues that may affect the constitutionality of this practice, but also the deft use of sophisticated theoretical tools drawn from American Legal Realism. The paper was well-researched and fluidly written.

Date: 9.20.2022 10:46AM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Sydenstricker, Ingrid
Exam #:	14044
Course Title:	Independent Study
Course ID:	LAW 7978
Credits:	3
Term:	Summer 2022 Law Semester
Instructor :	Jackson, Daniel
Grade:	High Honors

Course Description:

Any upper level student in good standing may engage in one or more independent study projects, totaling not more than three credits during an academic quarter and six credits during the two upper level years. A student wishing to conduct an independent study must secure the approval of a faculty member who agrees to supervise the project. Many students use independent studies to continue to examine a topic begun during co-op, or to extend the syllabus of a course. Students may also design projects which are not based in either course work or co-op, but in all cases a faculty sponsor must agree to the project. May be repeated for up to 6 total credits.

Performance Highlights:

This independent study saw Ingrid join a team of two other law students who were staffed as research/editorial/content assistants for the NuLawLab directors' book Legal Design: Dignifying People in Legal Systems, to be published by Cambridge University Press in Summer 2023. The edited volume rests on the premise that legal systems, as currently configured, often fail to enhance the dignity of people moving through them, despite the importance of dignity to achieving human wellbeing and systemic equity in today's societies. It proposes that the emerging and rapidly growing field of legal design, when applied to reimagining legal systems, can produce the opposite result–systems that enhance human dignity and therefore justice and fairness. Ingrid and her two colleagues worked in close collaboration with the book team of three co-editors (NuLawLab's executive, creative, and design directors) throughout the summer to support the development and drafting of a number of the book's chapters. Each week saw a one hour weekly team meeting for which Ingrid prepared a research progress report and participated in a lively discussion of the import of her research findings. New research assignments were distributed roughly every two weeks.

- Ingrid did an outstanding job on this work. She is an excellent, tenacious researcher with a particular talent for easily working across multiple disciplines and theoretical frameworks (sometimes in the same research question).
- Her work focused on literature reviews regarding:
  - the impact of cultural organizing on housing justice;
  - how social justice advocates define and work with cultural organizing methods;
  - dignity jurisprudence (both contemporary and historical);
  - how law, design and legal design projects can center dignity; and
  - the intersection of dignity and inclusive design.
- Ingrid was an outstanding team member, who approached her work with an equal combination of diligence and precision.
- Ingrid's natural talents of precision and thoroughness will serve her well in her legal career.

Date: 9.28.2022 4:28PM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Sydenstricker, Ingrid
Exam #:	14044
Course Title:	Professional Responsibility
Course ID:	LAW 7443
Credits:	3
Term:	Summer 2022 Law Semester
Instructor :	Long, Alex
Grade:	High Honors

Course Description:

This course focuses on the legal, ethical and professional dilemmas encountered by lawyers. Emphasis is on justice as a product of the quality of life that society provides to people rather than merely the process that the legal system provides once a crime or breach of duty has occurred. The course also provides students with a working knowledge of the American Bar Association's Model Rules of Professional Conduct and the Code of Professional Responsibility as well as an understanding of the underlying issues and a perspective within which to evaluate them. In addition, the course examines the distribution of legal services to poor and non-poor clients.

Performance Highlights:

- Acquired a thorough overview of the rules of professional conduct, common law principles, and constitutional rules that regulate the conduct of lawyers.

- Made meaningful contributions to class discussions.

- Wrote an excellent research paper on the subject of the appointment of a special prosecutor to prosecute a case following the refusal of the U.S. Attorney's Office to do so.

Date: 9.2.2022 10:23AM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Sydenstricker, Ingrid
Exam #:	14044
Course Title:	Environmental Law
Course ID:	LAW 7329
Credits:	3
Term:	Summer 2022 Law Semester
Instructor :	Meeks, Sarah
Grade:	Honors

Course Description:

This course focuses on federal and state environmental laws. Topics include pollution control, waste management, and cleanup of contaminated land and water. The course explores legislative policy and regulatory decisions as well as enforcement issues. We will give attention to questions of environmental justice and to the strategic use of legal tools in working to ensure safe and healthy surroundings for diverse groups of people.

Performance Highlights:

- Gained a solid understanding of several federal environmental statutes, including the Clean Water Act, Clean Air Act, Comprehensive Environmental Response, Compensation, and Liability Act (Superfund), Resource Conservation and Recovery Act, Endangered Species Act, and the National Environmental Policy Act.
- Demonstrated strong writing skills and legal analysis.
- Made valuable contributions to class discussion.
- Completed an outstanding written assignment on a complex legal issue presented in a Clean Air Act case pending before the U.S. Supreme Court.

Date: 9.22.2022 10:58PM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Sydenstricker, Ingrid
Exam #:	13429
Course Title:	LSSC: Research & Writing
Course ID:	LAW 6165
Credits:	2
Term:	Spring 2022 Law Semester
Instructor :	Mallory, Carol
Grade:	High Honors

Course Description:

Competent and effective legal research and writing skills are the foundation for students' success in law school and in their legal careers. In LSSC's Legal Analysis, Research and Writing component, students learn about the organization of the American legal system, the sources and construction of laws, and how the application of laws may vary with the specific factual situation. Students learn how to research the law to find applicable legal rules, how to analyze and apply those rules to a factual situation, and how to communicate their legal analysis clearly and concisely to different audiences.

Performance Highlights:

Ingrid's performance in this class was excellent. Ingrid has strong analytical skills; her analysis was always well-supported by the law and she possesses the ability to think creatively about the application of law to fact that will make her an effective advocate. Ingrid research skills are impressive as well. She approaches research thoughtfully and creatively; her research was always thorough, and she is able to clearly distill the relevant authority in furtherance of his analysis. Ingrid's writing skills are similarly strong; her written work is always clear, concise, and well-organized. Her final brief—a memorandum of law in opposition to a motion for summary judgment—was a compelling and well-crafted piece of advocacy that a practicing attorney would be proud of. Finally, Ingrid demonstrated the ability to become an effective oral advocate; in her final oral argument she delivered a persuasive argument on behalf of her client and did so with poise and confidence. In short, Ingrid possesses the intellect and skill to become an exceptional attorney.

Date: 5.31.2022 4:14PM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Sydenstricker, Ingrid
Exam #:	13429
Course Title:	Criminal Justice
Course ID:	LAW 6103
Credits:	4
Term:	Spring 2022 Law Semester
Instructor :	Ramirez, Deborah
Grade:	Honors

Course Description:

In this course, students are introduced to the fundamental principles that guide the development, interpretation and analysis of the law of crimes. They are also exposed to the statutory texts—primarily the Model Penal Code, but also state statutes. In addition, students are introduced to the rules and principles used to apportion blame and responsibility in the criminal justice system. Finally, students examine the limits and potential of law as an instrument of social control.

Performance Highlights:

Overall, your performance in this class was excellent. On the exam, you did an excellent job of analyzing the Model Penal Code issues presented by the factual scenario in question one. On question two, you did an excellent job of analyzing the federal search and seizure issues that might be raised by the attorneys for Cougar and Samuel. In particular, you did an excellent job of analyzing Lucy's liability for murder

Date: 5.31.2022 2:32PM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Sydenstricker, Ingrid
Exam #:	13429
Course Title:	Constitutional Law
Course ID:	LAW 6101
Credits:	4
Term:	Spring 2022 Law Semester
Instructor :	Paul, Jeremy
Grade:	Honors

Course Description:

Studies the techniques of constitutional interpretation and some of the principal themes of constitutional law: federalism, separation of powers, public vs. private spheres, equality theory and rights analysis. The first part of the course is about the powers of government. The second part is an in-depth analysis of the 14th Amendment.

Performance Highlights:

You demonstrated strong ability to identify key legal issues.

Your knowledge across all sections of the course was impressive.

Your essays are clearly written and well-organized.

Date: 6.13.2022 10:12AM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Sydenstricker, Ingrid
Exam #:	13429
Course Title:	Contracts
Course ID:	LAW 6102
Credits:	5
Term:	Spring 2022 Law Semester
Instructor :	Phillips, David
Grade:	Pass

Course Description:

This course examines the legal concepts governing consensual and promissory relationships, with emphasis on the historical development and institutional implementation of contract theory, its relationship and continuing adaptation to the needs and practice of commerce, and its serviceability in a variety of non-commercial contexts. Topics covered include contract formation, the doctrine of consideration, remedies for breach of contracts, modification of contract rights resulting from such factors as fraud, mistake and unforeseen circumstances, and the modern adaptation of contract law to consumer problems. This course also introduces students to the analysis of a complex statute: the Uniform Commercial Code.

Performance Highlights:

You performed well on the challenging multiple-choice first part of the examination.

Your answers to the three essay problems evinced competent knowledge of the contract law studied in the course.

You also chose to write a short optional paper and selected as your topic feminist perspetives on premarital agreements.

Thank you for your active participation in class.

Date: 6.2.2022 3:43PM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Sydenstricker, Ingrid
Exam #:	13429
Course Title:	Legal Skills in Social Context
Course ID:	LAW 6160
Credits:	2
Term:	Spring 2022 Law Semester
Instructor :	Mallory, Carol
Grade:	High Honors

Course Description:

The LSSC Social Justice component immediately applies students' legal research and writing skills in using law as a tool for social change. LSSC links students' pre-law school thinking with the new legal culture in which they find themselves. In the first semester, they begin by forging their own team lawyering dynamic in discussing assigned readings and in preparing, and presenting, several advocacy exercises and written assignments. In the second semester, students apply and consolidate their new legal research and writing skills in addressing an intensive real-life social justice project for a selected client organization. LSSC student teams develop their legal and cooperative problem-solving skills and knowledge while producing real client work of a quality that far exceeds the ordinary expectations of first-year law students. May be repeated once.

Performance Highlights:

As a part of the LSSC course, a group of law students, called a "Law Office" (LO), work together on a year-long social justice project on behalf of a community-based organization. Ingrid was a member of LO10, which worked on a project on behalf of a Chicago non-profit whose mission is to support grassroots organizations and movement building around the abolition of the prison-industrial complex (due to the nature of their work, the organization wishes to remain anonymous.) The focus of LO10's project was on the history of the Chicago Police Department (CPD), the historical efforts to reform it, and why those efforts have failed. The LO researched statutes, city ordinances, police oversight mechanisms, budgets, police unions, prominent political actors, and individual activists and movements for reform. The LO's project culminated in the creation of a website to catalogue their extensive research. The LO presented the results of their research to the community in a presentation entitled " The Past is The Present:The violent anti-Black legacy of policing in Chicago and why abolition is the only path forward."

As a whole, LO10 was the most collaborative, collegial, high functioning, and effective LO I have had the pleasure to work with in the seven years I've been teaching this course. As a group the law office held themselves to an extremely high standard; their performance—individually, in sub-groups, and as a group—was exceptional, and it was evident in their stellar final work product.

Ingrid's performance in this portion of the class was equally strong. Ingrid was an invaluable member of the LO, who made enormous contributions to the success of the project, as well as the class itself. Ingrid was deeply engaged with the social justice issues covered in the course; her reflective essays on these topics were insightful and her contributions to the class discussions pushed her classmates to think about the issues in important ways. Ingrid was similarly thoughtful and reflective in her work on the LO's project; her commitment to the successful completion of the project was evident from the beginning of the class and never wavered. Her ability to think critically and creatively helped to guide the direction of the project in important ways, and she often raised important considerations that her classmates might not have thought of, but which helped to frame the project and ensure its success. Ingrid also did excellent work with her subgroups researching relevant mayoral executive orders as well as examining the role the Chicago Police Department's use of resources has played in the development of Chicago. Where Ingrid most excelled was in her role as one of the presenters for the group's final presentation. With her co-presenters, Ingrid was able to synthesize the enormous amount of research the LO had

compiled, pull out the themes and takeaways from the research, and organize a presentation that was informative, dynamic, and engaging. Ingrid' did an exceptional job with her own portion of the presentation; she demonstrated a natural affinity for public speaking that will serve her well as an advocate.

Date: 5.31.2022 4:15PM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Sydenstricker, Ingrid
Exam #:	12912
Course Title:	Civil Procedure
Course ID:	LAW 6100
Credits:	5
Term:	Fall 2021 Law Semester
Instructor :	Williams, Lucy
Grade:	High Honors

Course Description:

Introduces students to the procedural rules that courts in the United States use to handle noncriminal disputes. Designed to provide a working knowledge of the Federal Rules of Civil Procedure and typical state rules, along with an introduction to federalism, statutory analysis, advocacy, and methods of dispute resolution. Examines procedure within its historical context.

Performance Highlights:

- You identified virtually all of the issues.
- Your analysis reflected a solid understanding of the complex materials covered in the course.
- You regularly cited to relevant statutes, caselaw and rules.
- Your discussions of personal jurisdiction, the Erie doctrine as it related to Rule 35, and summary judgment were particularly strong.
- Your paper was very well written.

Date: 1.20.2022 6:33PM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Sydenstricker, Ingrid
Exam #:	12912
Course Title:	Property
Course ID:	LAW 6105
Credits:	4
Term:	Fall 2021 Law Semester
Instructor :	Kelley, Melvin
Grade:	Honors

Course Description:

This course covers the major doctrines in American property law, including trespass, servitudes, estates in land and future interests, landlord-tenant relationships, nuisance, and takings. Students are introduced to rules, policies, and current controversies.

Performance Highlights:

Demonstrated knowledge of core U.S. Property Law doctrine and associated public policy considerations as well as a capacity to mobilize these insights to assess novel fact patterns.

Date: 2.24.2022 1:54PM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Sydenstricker, Ingrid
Exam #:	12912
Course Title:	Torts
Course ID:	LAW 6106
Credits:	4
Term:	Fall 2021 Law Semester
Instructor :	Kahn, Jonathan
Grade:	Honors

Course Description:

This course introduces students to theories of liability and the primary doctrines limiting liability, which are studied both doctrinally and in historical and social context. The course includes a brief consideration of civil remedies for intentional harms, but mainly focuses on the problem of accidental injury to persons and property. It also provides an introductory look at alternative systems for controlling risk and allocating the cost of accidents in advanced industrial societies.

Performance Highlights:

Demonstrated a clear grasp of key tort principles and the contexts in which they apply.

Did a solid job of issue spotting and applying understandings of theories of responsibility and alternatives to evaluate and apply legal rules to specific situations.

Your exam adeptly analyzed legal problems while applying rules to new fact patterns.

Date: 1.20.2022 6:35PM

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

In my fifteen years of teaching, I have not encountered a student more obviously suited for a federal clerkship than Ingrid Sydenstricker. Ingrid chose to attend Northeastern University School of Law because our mission aligns with her own commitment to social justice; had she chose instead to attend a top tier law school I have no doubt she would be among the top in her class. She possesses the intellect, intellectual curiosity, skill, work ethic, attention to detail, and commitment to excellence to be an exceptional law clerk; I hope you give her application serious consideration.

Ingrid was a student in my Legal Skills in Social Context (LSSC) course her first year in law school. LSSC is a class unique to Northeastern, and therefore requires a bit of an introduction. LSSC is a year-long required course for all first-year students and has two components. Part of the class is a traditional first-year legal research and writing class; in the other component of the class students work as a group on an intensive year-long social justice project in partnership with a partner organization. Ingrid worked on a project on behalf of a nonprofit in Chicago whose mission is to support activists and organizations engaged in the work of rethinking policing.

In both portions of LSSC Ingrid's performance was outstanding, demonstrating exceptionally strong research skills, a natural affinity for legal analysis, and an excellent ability to communicate both orally and in writing. Ingrid is intellectually curious and a critical thinker, which allows her to comprehend the full range of possible analyses of an issue. Her ability to engage in deep analysis of complex legal issues is on par with the brightest attorneys I have worked with over the years. Ingrid's research skills are similarly strong; she approaches research thoughtfully, and therefore efficiently, and is able to use her strong analytical abilities to identify the relevance of cases that most students would have missed. Finally, Ingrid conveys her analysis effectively both orally and in writing. Her written work was always well-organized, beautifully written, clear, and concise. Given the strength of Ingrid's research and writing skills I have hired her to be a Teaching Assistant for me this fall. It is also no surprise to me whatsoever that Judge Sorokin remarked in Ingrid's co-op evaluation that she was among the top 3 interns he has worked with in over 17 years on the bench.

In addition to the strength of her intellect and skill, Ingrid is a dedicated professional who throws herself into everything she does. This was evident in her work on the project portion of the LSSC class. Her ability to think critically and creatively helped to guide the project in important ways, and her contributions to the final work product were excellent. This included being one of the presenters of the project's culminating community presentation, where she demonstrated exceptionally strong oral communication skills. Most notably, however, it became clear early on that Ingrid is a natural leader. Her strong organizational skills, commitment to producing a quality work product, and the respect and support she showed her classmates, inspired others in the class to do their best work as well.

What is perhaps most remarkable about Ingrid, however, is that her intellect and skill are matched by her personal qualities. She is an incredibly thoughtful person in everything she does, someone who is deeply committed to and passionate about social justice, as well as kind and respectful to all. In short, she is a lovely human being who would be a pleasure to work with. I can't recommend her strongly enough.

If you should have any questions, please feel free to contact me.

Sincerely,

Carol R. Mallory
Teaching Professor
c.mallory@northeastern.edu
617-373-5841

Northeastern University
School *of* Law

April 18, 2023

ADDRESS

Dear Judge:

I write to lend my most enthusiastic endorsement to Ingrid Sydenstricker in her application to clerk in your court. Ingrid was my student in a seminar on Sexuality, Gender, and the Law in 2022. She was among the most sophisticated thinkers in the class and wrote a paper that so surpassed my general expectations in the course that I encouraged her to submit it for publication. Ingrid comes with my highest recommendation.

Ingrid came to Northeastern University School of Law (NUSL) as a Public Interest Law Scholar (PILS). This full-tuition scholarship is granted only to those students whose academic credentials exceed the norm and who have demonstrated a commitment to pursuing social justice legal work. As an honors graduate and university scholar from the University of Chicago, Ingrid satisfied the former criterion. As to the latter, she was awarded the University of Chicago's Humanitarian Award, participated in the Pozen Summer Human Rights Fellowship, volunteered as a crisis counselor on a suicide hotline, worked as a paralegal for the ACLU of New York, and worked in environmental justice and policy analysis at Cornell University. This is all before she enrolled in law school. She was an ideal fit for the PILS scholarship.

Since her arrival, Ingrid has lived up to the promise that my colleagues in charge of the PILS scholarship saw in her. A review of Ingrid's transcript illustrates her continuing academic success; she has so far earned almost entirely honors and high honors in her classes. Her instructors from every course emphasize her leadership in class discussion, her top-notch research and writing skills, and her doctrinal mastery. In my seminar, Ingrid wrote one of the best papers I have received in fifteen years of teaching the course. She chose to write about an unsettled area of law that required grappling with complex constitutional doctrine: the advisability of establishing sanctuary cities to protect access to abortion. Ingrid not only wrangled the federalism doctrine to the ground, but also managed to perform a sophisticated legal realist analysis attentive to the risks as well as the concrete distributive effects of the full range of legal possibilities. Because her analysis was so sharp and the issue so timely and important, I urged her to develop the paper further into a law review article.

The rubber really hits the road, however, in the evaluation Ingrid received after working as a judicial intern for the Honorable Leo T. Sorokin of the Federal District Court of Massachusetts. She also served (at his invitation) as Judge Sorokin's teaching assistant for a course he teaches at Boston College Law School. Amy Robinson, the judge's permanent law clerk, summarized Ingrid's time in chambers as follows:

> Ingrid is a star who ultimately performed more like an extra term law clerk than a student intern. She's one of the top 3 interns I have supervised in my ten years working for Judge Sorokin (plus 3 years working for other federal judges earlier in my career). The judge also places her among the top 3 interns he has encountered during his 17+ years on the bench. She so impressed him that he asked her to continue on a part-time basis to assist him with a restorative justice class he teaches in the spring at Boston College.

Robinson added, "Any employer, including any judge receiving an application from her for a post-graduate term clerkship, would be lucky to hire her." The evaluation goes on in greater detail, but I wish to highlight Ingrid's ability to work independently and incorporate feedback, as well as Robinson's remark that "Ingrid efficiently produced thoughtful, helpful work product showing her understanding of the relevant facts and legal principles. She was one of the most prolific interns we have ever had in our chambers." Ingrid was on an externship with an environmental justice organization, the 80 Acres Law Center, which has not, as of this writing, provided an evaluation, but which nonetheless suggests her continuing commitment to social justice.

Consistent with her ethic of community engagement, Ingrid has participated in various law student organizations, worked as a research assistant to one of my colleagues, and served on the Student Conduct/Title IX Board for the University. She is well-read, and speaks Portuguese, Spanish, French, and beginner Arabic. Her demeaner is generous, confident without a hint of arrogance, thoughtful, and good-humored.

In sum, Ingrid will be a pleasant addition and a working asset in any legal environment. If I can answer any questions, please do not hesitate to reach out to me at the coordinates below.

Sincerely,

Libby Adler
Professor of Law
Northeastern University
l.adler@northeastern.edu
617-373-7513

United States District Court

UNITED STATES COURTHOUSE
1 COURTHOUSE WAY,
BOSTON, MASSACHUSETTS 02210

LEO T. SOROKIN
UNITED STATES DISTRICT JUDGE

January 30, 2023

Re: Clerkship Reference Letter for Ingrid Sydenstricker

Dear Judge:

Ingrid Sydenstricker served as a full-time intern in my chambers from September, 2023 to December, 2023. Ingrid was so superb I asked her both (1) to stay on to assist me in completing a complicated Rule 12(c) decision and (2) to serve as my teaching assistant for the class I teach each Spring at Boston College Law School. Never before have I made similar asks of an intern. My reference letter is based on this experience. You should know that there is only one reason I am not hiring Ingrid as my law clerk upon her graduation from law school: my long-standing chambers rule not to hire my interns as law clerks.

When Ingrid arrived in my chambers she was, at best, halfway through her three years of law school. Yet, she quickly produced work on par with my term law clerks. Her legal research was both efficient and comprehensive. Her writing was excellent. She understands legal analysis requires much more than citing a legal rule coupled with an identification of the prevailing party perhaps with the word "thus" added. In her work she explained why the conclusion followed from the rule by persuasively applying the law she researched to the facts (determined under the proper legal standard) confronting the court. Most interns and many law clerks give short shrift to this step in their bench memos or draft opinions. Not Ingrid. The caliber of her early work persuaded me to treat her as if she was a law clerk.

Ingrid performed superbly in a range of matters. She was meticulous in her summary and analysis of the facts even in complicated cases requiring a close read of both various pleadings filed over a period of time and the docket. Her legal research was flawless. Her work encompassed not only the usual social security disability appeal I typically assign to interns, but a thorny nuanced recusal issue which arose in a large civil action pending before me, a motion for sanctions in a civil case arising from alleged trespass by a lawyer's investigator that implicated the conduct of both the individual case as well as many other admiralty cases, and a complicated set of cross-motions requiring analysis of a state statutory scheme regulating mobile home parks. That case involved analyzing the rent control authority granted to a municipality over a mobile home park, the authority of the Commonwealth's Attorney General to interpret the state statutory scheme, the application of a binding state supreme court interpretation of one aspect of the state statute and a novel sweeping remedy sought by the plaintiffs. She handled

each of these matters along with her other responsibilities well. Ingrid deserves what I consider the highest praise: when she writes or tells me something I know it is correct and I rely on it without hesitation. I also know Ingrid will bring to me meaningful questions and issues. And, she is the person that earnestly welcomes feedback and successfully incorporates it into her work.

Ingrid is also an excellent professional more in the mold of an experienced lawyer than second year law student. In the course of her internship I was meeting regularly with a team of high powered researchers from Massachusetts General Hospital about a possible joint project. Ingrid regular communicated on my behalf with these researchers. She did so flawlessly.

Finally, Ingrid is just a lovely warm curious person. She was simply a delight to have in chambers. She has a wide array of interests and talents including that she speaks four languages fluently (English, French, Portuguese, and Spanish), with some language capacity in Arabic. She formed close comfortable relationships with my long time career law clerk, with my two term law clerks and the other intern in chambers. Personally, I very much enjoyed our conversations. She is deeply committed to becoming both an excellent lawyer and one whom dedicates her career to employing her skills on behalf of those in need.

Simply put: You should hire Ingrid. I give her the highest possible recommendation.

. Very truly yours,

Leo T. Sorokin

Leo T. Sorokin
United States District Judge

WRITING SAMPLE

Ingrid Vianna Sydenstricker
sydenstricker.i@northeastern.edu
607-227-7838

The following is a decision resolving cross-motions for judgment on the pleadings regarding rent policies at a manufactured housing development. I drafted the decision in February 2023 as part of my internship with the Hon. Leo T. Sorokin at the U.S. District Court for the District of Massachusetts. While the decision was revised before it was issued, it largely reflects my own work. The decision is shared with Judge Sorokin's permission.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EDWIN BARTOK, et al.,	)	
Plaintiffs,	)	
v.	)	Civil No. 21-10790-LTS
HOMETOWN AMERICA, LLC, et al.,	)	
Defendants.	)	

ORDER ON DEFENDANTS' AND PLAINTIFFS' CROSS-MOTIONS FOR PARTIAL JUDGMENT ON THE PLEADINGS (DOC. NOS. 78, 88)

February 27, 2023

SOROKIN, J.

In 2021, plaintiffs Edwin Bartok, Barbara Lee, and the Manufactured Home Federation of Massachusetts, Inc. ("MFM") commenced this action against Defendants for alleged violations of the Consumer Protection Act and the Manufactured Housing Act. Bartok and Lee are residents at the manufactured housing communities at Miller Woods and Oak Point, respectively, which are owned and operated by Defendants. MFM is a "membership-based, non-profit organization which is dedicated to protecting the rights of manufactured housing residents in Massachusetts." Doc. No. 11 ¶ 20.[1]

In 2022, Defendants moved for partial judgment on the pleadings as to Counts II and IV of the First Amended Complaint, those pertaining to Oak Point. Doc. No. 78. Plaintiffs then cross-moved for judgment on the pleadings to strike the Fourth, Seventeenth, and Eighteenth

[1] Citations to "Doc. No. __" reference documents appearing on the court's electronic docketing system; pincites are to the page numbers in the ECF header.

Additional Defenses asserted in Defendants' Answer and Defenses to the First Amended Class Action Complaint. Doc. No. 26 at 16, 20; Doc. No. 88. The motions are fully briefed, and the Court heard argument on January 6, 2023. Doc. No. 109.

The Court first addresses Defendants' motion, applying the familiar Rule 12(c) standard in which the Court accepts all facts pled by Plaintiffs as true and draws all reasonable inferences in Plaintiffs' favor. After carefully reviewing the parties' submissions and arguments, the Defendants' Motion for Partial Judgment on the Pleadings (Doc. No. 78) is DENIED. Subsequently, the Court proceeds to Plaintiffs' cross-motion, applying the same legal standard and finding that even when all reasonable inferences are drawn in Defendants' favor, Plaintiffs prevail. Accordingly, Plaintiffs' Cross-Motion for Judgment on the Pleadings (Doc. No. 88) is ALLOWED.

I. BACKGROUND

The Manufactured Housing Act ("MHA"), originally passed by the Massachusetts Legislature in 1939, was designed to "protect the rights of residents of mobile home parks." Layes v. RHP Props., Inc., 133 N.E.3d 353, 361 (Mass. App. Ct. 2019). Since then, the Legislature has further developed this regulatory scheme by enacting amendments that provide additional protections, such as those passed in 1973. Blake v. Hometown Am. Cmtys., Inc., 158 N.E.3d 18, 27-28 (Mass. 2020). These protections were instituted to preserve the affordability of manufactured housing communities ("MHCs"), particularly for low-income families and the elderly. Id. Such protections include prohibiting no-cause evictions, barring the imposition of unreasonable insurance requirements on residents, and requiring that MHC operators provide residents with notice and relocation costs in the event of the MHC's closure. Id. at 27. In passing the amendments, the Legislature also recognized that creating and preserving the affordability of

MHCs required MHCs to be secure investments such that owners would be able to recoup their costs and get an adequate return on their investments. Id. at 29.

Among their many protections, the amendments include the provision codified at § 32L(2)—central to the present suit—which states: "Any rule or change in rent which does not apply uniformly to all manufactured home residents of a similar class shall create a rebuttable presumption that such rule or change in rent is unfair." Mass. Gen. Laws ch. 140, § 32L(2). The same section provides that failure to abide by § 32L(2) "shall constitute an unfair or deceptive practice" under Chapter 93A, § 2(a), thus subjecting those in violation to liability. Id. § 32L(7).

Determining the meaning of the MHA is a question of statutory interpretation ultimately left to the courts. Blake, 158 N.E.3d at 26. In interpreting statutes, the Court is guided by the intent of the Legislature as determined by the plain meaning of the statute's language when considered in the context of the Legislature's overall goals in enacting the statute. Id.

When considering the MHA, and specifically § 32L(2), the Court does not confront a blank slate. Under Chapter 140, § 32S and Chapter 93A, § 2(c), the Massachusetts Attorney General ("AG") is empowered to interpret and enforce the MHA, including through adopting regulations. The Court is required to give substantial deference to the AG's interpretation unless it is found to substantially contradict the plain language of the statute. Blake, 158 N.E.3d at 26. The AG's interpretation of § 32L(2) is found in the AG's own regulations, Manufactured Housing Community Regulations ("Regulations"), and the additional guidance found in The Attorney General's Guide to Manufactured Housing Community Law (2017) ("Guide").[2] 940 Code Mass. Regs. 10.00–10.14 (1996). The AG also provided further clarification regarding

[2] Mass. Att'y Gen.'s Off., *The Attorney General's Guide to Manufactured Housing Community Law* (2017), available at https://www.mass.gov/doc/attorney-generals-guide-to-manufactured-housing-nov-2017.

§ 32L(2) in an amicus letter to the Supreme Judicial Court ("SJC") in Blake, when the SJC was tasked with providing its own interpretation of the provision. Doc. No. 88-6; see Blake, 158 N.E.3d at 28-29.

The use of the term "similar class" as found in § 32L(2) appears only in the Guide, in which the AG states that "[i]n general, any change in rent must be applied uniformly to all residents of a similar class. A rent increase that is not applied uniformly to residents who receive similar services and have similar lot sizes may be unfair under the [MHA]." Guide at 24. The Regulations, while not referring to "similar classes," use the term "non-discriminatory rent increases" to refer to "proposed rental increases . . . that are apportioned equally among similarly situated tenants in the community." See 940 Code Mass. Regs. 10.01, 10.05(4)(c), 10.05(8) (1996). As described in the AG's amicus letter to the SJC in Blake, the Regulations and the Guide embody the AG's interpretation of § 32L(2). Doc. No. 88-6 at 3.

In that same letter, the AG explained that a determination of similar classes under § 32L(2) requires a "fact-specific inquiry that principally relates to the nature of the residents' lots and the services they receive . . . ." Id. While such an inquiry presumes unfairness when similar classes are treated differently in rent—as written into the statute—certain circumstances may warrant the non-uniformity. Id.; Blake, 158 N.E.3d at 29. Such a showing would rebut the presumption; failure to rebut the presumption renders the non-uniform rent structure unfair.

The SJC—the final authority on Massachusetts law—has also recently construed § 32L(2). In Blake, the SJC was confronted with an MHC operator who, upon purchasing the MHC, promptly raised the rent for all new lot rental agreements by ninety-six dollars a month. Blake, 158 N.E.3d at 24. Residents and tenants who had entered into agreements before the change in ownership were not subject to the increase in rent, despite having similar sized lots

with access to similar amenities. Id. In its decision determining whether the non-uniform rents constituted a violation of § 32L(2), the SJC provided several key holdings:

> [W]e reject the owners' argument that time of entry into a lot rental agreement renders the renters dissimilar under the statute.
>
> * * *
>
> The defendants argue that the timing of entry into lot rental agreements renders the plaintiffs not in a "similar class" under the statute, even if the lots rented are essentially the same with the same amenities. This contention is incorrect.
>
> * * *
>
> Charging different amounts of rent for essentially the same lot appears to violate the uniformity presumption presented by the plain language of the statute. Although different lot sizes or amenities would clearly divide the residents into different classes, time of rental does not appear to defeat the uniformity principle contained within the statute. If every time a lot turned over, a different class were created, there would be no uniformity whatsoever.
>
> * * *
>
> Section 32L (2) clearly states this concern [of maintaining manufactured housing communities as affordable housing options] by creating a presumption that nonuniform rents for similar classes of residents are unfair.
>
> * * *
>
> In sum, the language and legislative history of § 32L (2) provide for a presumption of uniform treatment and protection of the low income residents of manufactured housing communities, new and old. Nowhere does the text or legislative history of the statute indicate that a turnover in a lot lease would create a new class of resident and subject that new resident to paying more rent than others for the same lot. If every such change created a new class of resident, and allowed unrestricted rent increases, there would be no uniformity and no protection.
>
> * * *
>
> In light of the text of the statute as a whole, the Attorney General's guidance, and the legislative history, we hold that time of entry into an occupancy agreement does not create a dissimilar class under § 32L (2). Such an interpretation would allow a manufactured housing community operator to completely circumvent § 32L (2) by

> creating a new class each time a new lease is signed, and remove the protections that the statute offers against unfair and nonuniform changes in rent.
>
> * * *
>
> Because the defendants have violated G. L. c. 140, § 32L (2), damages are governed by G. L. c. 93A.

Id. at 24, 26-29, 33. The SJC also held that the AG's interpretation as set forth in the amicus letter was "consistent with [their] interpretation of § 32L(2)." Id. at 29. The SJC's interpretation of § 32L(2) in Blake opened the door to actions such as this one. In at least partial response to Blake, Plaintiffs sued the owners and operators of the Oak Point Manufactured Housing Community in Middleborough, Massachusetts alleging that the Oak Point rent structure—a non-uniform structure—was unlawful. See Doc. No. 11.

As described by Plaintiffs, the Oak Point rent structure sets rent "based on a resident's or tenant's date of entry into the community," such that new entrants are charged higher rents even when they are "leasing home sites and receiving services similar to the home sites leased or services received by existing residents or tenants." Doc. No. 11 ¶¶ 31-32. The leases are for lifetime occupancy with the only annual rent increases based on the annual percentage change in the consumer price index. See Doc. No. 29-1 at 6-15.

According to Plaintiffs, this rent structure has produced dissimilar rents for similar classes of Oak Point tenants in violation of Chapter 93A, § 9 and Chapter 140, § 32L(2). Doc. No. 11 ¶¶ 118-24, 132-38. Defendants assert that they are not subject to liability because Chapter 93A, § 3 exempts "actions otherwise permitted under laws as administered by any regulatory board or officer acting under statutory authority of the commonwealth." See Doc. No. 78. Defendants argue that the exemption applies to the Oak Point rent structure because the rent structure has been permitted by the Middleborough Rent Control Board ("the Board"). Id.

The Board was established by the Massachusetts Legislature through the Special Act of 1985, which was enacted to address the "emergency . . . created by high and unwarranted rental increases imposed by some park owners of mobile home parks." Doc. No. 78-2 at 1. Such increases were deemed a risk to the "public safety, health and general welfare of the citizens of [Middleborough], particularly the elderly." Id. Under Section 2 of the Special Act, the Legislature authorized the creation of a Middleborough rent board to regulate "rents, standards and evictions" of mobile home park accommodations to "remove hardships, or correct inequities for both the owner and the tenants." Id. at 1-2. When regulating rent, Section 3 authorized the Board to consider the need to guarantee a fair net operating income for mobile home park owners, including how changes to property taxes, maintenance expenses, and other conditions may impact owners. Id. at 2. The Special Act of 1985 made no mention of either Chapter 140 or any authority of the Board to enforce or interpret its provisions. Id. at 1-3.

The Board first confronted the issue of Oak Point's rent structure in 1998 when Saxon Partners, the developer and initial owner of Oak Point, submitted a rent proposal to the Town regarding the then-planned Oak Point MHC. Doc. No. 88-9 at 13; see Doc. No. 89 at 2. The proposal described the rent structure still in place at Oak Point today—lifetime leases in which the base rent is set at the time of the tenant's arrival to Oak Point and the only permitted increases are annual adjustments based on changes to the consumer price index. Doc. No. 78-1 at 11-12. Over the course of several meetings that year, the Board discussed the Oak Point rent structure, but ultimately decided not to vote on the proposal nor take any formal action. Id. at 8-12, 26-28. At the same time, the Board made no effort to adjust the proposal nor prevent its implementation. Id. at 26-28. Without restrictions imposed by the Board, Saxon Partners implemented the proposed rent structure at Oak Point.

In 2009, the issue of Oak Point's rent structure again came before the Board. Id. at 54. The rent structure was raised during the Board's drafting and ultimate passage of the Rules and Regulations for Mobile Home Park Accommodations, Rent, and Evictions ("the Middleborough Rules"), which explicitly set forth maximum rent requirements under Section 2, "Maximum Rent." Id. at 70-80. Section 2 states that the maximum rent for a new manufactured home may "be higher or lower than the maximum rent for other mobile homes in the park when the rental housing agreement is made." Id. at 72-73. For manufactured homes which were previously owned, the maximum rent—established by a new agreement—shall not exceed either (1) the rent being offered to purchasers of new manufactured homes (in cases where the MHC owner is selling new manufactured homes at that time) or (2) the highest rent being paid by other tenants (in cases where the MHC owner is not selling new manufactured homes at the time). Id. Once the annual base rent has been established, further increases must be approved by the Board or based on the annual change in the consumer price index as approved by the Board or as provided in the rental agreement. Id. at 73. The governing rules in place today, most recently amended in 2013, retain the original language of Section 2. Id. at 131-32; Doc. No. 79 at 17.

In 2011, Defendants purchased Oak Point and continued to implement the original rent structure put in place by Saxon Partners, the same structure currently challenged by Plaintiffs. Doc. No. 11 ¶¶ 30-32. The Oak Point rent structure was, and continues to be, compliant with Section 2 of the Middleborough Rules. The heart of the present dispute is whether compliance with the Middleborough Rules entitles Defendants to an exemption under Chapter 93A, § 3. Defendants argue that they are exempt under § 3 because the Middleborough Rules "permit" the Oak Point rent structure within the meaning of that statute. See Doc. No. 79. In opposition, Plaintiffs assert that regardless of whether Oak Point's rent structure is compliant with the

Middleborough Rules, the Board lacked the authority to permit the structure in the first place and, accordingly, Defendants have no right to the § 3 exemption. See Doc. No. 89.

II. DISCUSSION[3]

The parties agree that if Defendants are entitled to the § 3 exemption, Claims II and IV of the First Amended Complaint must be dismissed. Alternatively, if Defendants are not entitled to the exemption, Defendants' motion must be denied; Defendants' Fourth, Seventeenth, and Eighteenth Affirmative Defenses must be struck; and the Court would later determine whether, under § 32L(2), Defendants are in fact charging dissimilar rents for similar classes of tenants without sufficient justification. As explained in the discussion that follows, the Court finds that the exemption does not apply because the Oak Point rent structure is not "permitted" within the meaning of Chapter 93A, § 3. At present, the Court takes no position on the ultimate § 32L(2) merits dispute. Several reasons support the conclusion that the exemption does not apply.

First, Defendants have failed to show more than a related or overlapping regulatory scheme. As such, they do not meet their "heavy" burden of proving the § 3 exemption applies. Aspinall v. Philip Morris, Inc., 902 N.E.2d 421, 424 (Mass. 2009). Courts are not to apply the exemption lightly. Ducat v. Ethicon, Inc., No. 4:21-CV-10174-TSH, 2021 WL 5749856, at *1 (D. Mass. June 4, 2021). To meet their burden, Defendants must show "more than the mere existence of a related or even overlapping regulatory scheme that covers the transaction. Rather, [Defendants] must show that such scheme affirmatively permits the practice which is alleged to be unfair or deceptive." Aspinall, 902 N.E.2d at 424 (emphasis in original, citations omitted). That permission must come from a "regulator authorized to review the defendant's actions" who,

[3] The Court acknowledges that there are differences in meaning between "tenants" and "residents." Those differences do not bear upon this decision. The Court has adopted the term "tenants" where applicable for the sake of simplicity.

in turn, has "determined that those actions, in particular, were not unfair or deceptive." O'Hara v. Diageo-Guinness, USA, Inc., 306 F. Supp. 3d 441, 454 (D. Mass. 2018), on reconsideration, 370 F. Supp. 3d 204 (D. Mass. 2019).

While it is true that the Oak Point rent structure complies with the Middleborough Rules and that the Board was well-aware of the Oak Point structure by the time the rules were passed, those rules express no binding determination over whether Defendants are separately compliant with § 32L(2). The Special Act of 1985, which established the Board, does not explicitly or impliedly authorize the Board to determine what is sufficient to rebut the presumption of unfairness under § 32L(2). Similarly, that law vests no authority in the Board to interpret, apply, or enforce § 32L(2) or any other provision of Chapter 140. Certainly, the Legislature did authorize the Board to regulate rents in ways that consider both tenant rights and the financial needs of operators, and the SJC has instructed rent control boards to "be mindful" of § 32L(2). Chelmsford Trailer Park, Inc. v. Town of Chelmsford, 469 N.E.2d 1259, 1264 (Mass. 1984). Nonetheless, that existing authorization and instruction decidedly fall short of authorizing the Board to determine whether classes of tenants are "similar" within the meaning of § 32L(2) or whether non-uniform rents are justifiable under § 32L(2). That fact-specific inquiry is not something the Board is authorized to do. Thus, the Board's regulations do not (and could not) "permit" the rent structure at Oak Point within the meaning of Chapter 93A, § 3. Rather, the Board is administering a related or overlapping rent control scheme through its regulations. Such a showing is insufficient to meet Defendants' heavy burden and, therefore, the exemption does not apply.[4]

[4] Moreover, the AG's regulations do not "expressly proclaim[]" that rent increases authorized by rent control laws are "permitted," as Defendants argue. Doc. No. 95 at 12-13. The principles of statutory interpretation require that the regulations be construed according to their plain

Second, § 32L(2) plainly creates substantive rights for tenants of manufactured housing communities that cannot be impaired by local governments. As previously described, § 32L(2) was added to the MHA as part of a package designed to protect the rights of tenants. The need for such rights was rooted in the Legislature's understanding that those tenants—often of fixed- or low-income status, such as the elderly or single parents—were vulnerable. Blake, 158 N.E.3d at 27-28. The Legislature sought to address these concerns by establishing a specific right with an associated cause of action. See Mass. Gen. Laws ch. 140, § 32L(7).

The text of § 32L(2) creates a legal standard against which non-uniform rent structures are to be measured. Under subsection two, a change in rent which does not apply uniformly to all "manufactured home residents of a similar class" is presumptively "unfair." Id. § 32L(2). Subsection six goes on to provide that "[a]ny rule . . . which is unfair or deceptive or which does not conform to the requirements of this section shall be unenforceable." Id. § 32L(6). Subsection seven endows plaintiffs with the ability to vindicate those rights by stating that "[f]ailure to comply with the provisions of sections thirty-two A to thirty-two S, inclusive, shall constitute an unfair or deceptive practice under the provisions of [Chapter 93A, § 2(a)]. Enforcement of

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language. Mass. Fine Wines & Spirits, LLC v. Alcoholic Beverages Control Comm'n, 126 N.E.3d 970, 975 (Mass. 2019). Here, Defendants misread the plain language of the applicable regulation, 940 Code Mass. Regs. 10.02. As relevant to this case, subsections two and seven of 10.02 set forth, respectively, that MHC operators must abide by § 32L(2) and that MHC rent increases must be allowed by rent control laws where they exist. Subsection eight, which Defendants take out of context, only applies to a subset of rent increases and only concerns when such increases are "unfair." This regulation does not encompass let alone "permit" rent increases which violate § 32L(2). Indeed, following Defendants' interpretation of the regulations would result in a municipal rent control law rendering any rent increase "permitted" despite the express provisions of the governing statute and the regulations. Such an outcome would contradict the well-established direction that courts not construe statutes in ways that reach "absurd" results when sensible construction is available. Commonwealth v. Tinsley, 167 N.E.3d 861, 869 (Mass. 2021).

compliance and actions for damages shall be in accordance with the applicable provisions of [Chapter 93A, §§ 4–10].” Id. § 32L(7).

Viewed together, these provisions of Chapter 140, §32L create a comprehensive structure to protect tenant rights. Subsection two creates a substantive legal standard against which to judge non-uniformity in rent, subsection six renders unenforceable any rules that violate subsection two, and subsection seven authorizes a cause of action to enforce the foregoing legal rights. Plainly, these provisions vest MHC tenants with substantive rights, which, in certain circumstances, afford them protection from non-uniform rent structures.

That the right is not unqualified—because its presumption of unfairness is rebuttable—does not make it any less of a right. Indeed, the bedrock constitutional right against government searches of private homes is itself not unqualified because it is limited only to prohibiting “unreasonable” searches, yet it is undoubtedly a right. See U.S. Const. amend. IV. Moreover, that the plaintiffs in Blake successfully challenged a non-uniform rent structure as a violation of § 32L(2) through Chapter 93A demonstrates that, in passing § 32L(2), the Legislature created a right. See Blake, 158 N.E.3d at 33.

Under Article 89, § 7(5) of the Constitution of the Commonwealth, cities and towns do not have the authority “to enact private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power . . .”. Mass. Const. art. 89, § 7(5). Consequently, Middleborough does not have the authority to modify or impair the substantive rights afforded by § 32L(2). Nor does the text of the enabling act of the Middleborough Rent Control Board—the Special Act of 1985—authorize Middleborough to step in and administer those rights.

Lastly, Defendants' interpretation proves too much. Under Defendants' theory, a rent control board concededly lacking the authority to enforce § 32L(2) could pass MHC regulations separating similar tenants into different rent classes without sufficient justification in contravention of § 32L(2) and, in doing so, could effectively (1) insulate the MHC owner from a Chapter 93A action challenging the rent structure and (2) preclude all future MHC tenants from challenging the legality of the rent structure under Chapter 93A. The Court rejects an interpretation resulting in such an outcome.[5] Such an interpretation would preclude judicial review, disregarding long-standing authority that the "duty of statutory interpretation rests ultimately with the courts." Blake, 158 N.E.3d at 26 (citations omitted, emphasis added).[6]

Of course, municipal rent control regulations are not irrelevant to the § 32L(2) analysis. To the contrary, the SJC has held that rent control boards must consider § 32L(2). Chelmsford Trailer Park, Inc., 469 N.E.2d at 1264. Various provisions of the AG's regulations reference and, in some sense, defer to municipal rent control determinations. See 940 Code Mass. Regs. 10.02(7), 10.02(8)(c) (1996). Rent control in Middleborough, as set forth in the Special Act of 1985, is meant to protect tenants and assure a reasonable income for the owner, objectives that are not dissimilar to those of the MHA. Blake, 158 N.E.3d at 30. The Middleborough Rules are

[5] A simple example building on Blake illustrates this point. Suppose a town with a rent control board enacted an MHC regulation authorizing a ninety-six dollar per month increase for all new tenants and, in response, an MHC operator implemented that rent structure. While current tenants could avail themselves of a Chapter 30A appeal of those regulations, they likely would have no reason to do so as their rent remained unchanged. Future tenants—the people who would be subject to the increase upon moving to the MHC—would likely lack both the standing and the interest to file an appeal at the time the regulations were adopted. If, after moving to the MHC, those tenants decided to challenge the non-uniform rent structure as a violation of § 32L(2), Defendants' interpretation would require a court to dismiss those claims without reaching the merits because the rent structure was compliant with the regulations and, thus, exempt under § 3.

[6] To be sure, the Court is not saying that Defendants have failed—or succeeded—to rebut the presumption of unfairness outlined in § 32L(2). At present, the Court only holds that the exemption does not apply.

certainly relevant—possibly even quite weighty—to the issues presented in this suit, but as a matter of law, they do not exempt Defendants from liability nor do they insulate the Oak Point rent structure from judicial review.

For these reasons, Defendants' Motion for Judgment on the Pleadings is DENIED. Turning to the Plaintiffs' Cross-Motion, the Court notes that even when viewing the matter under the defendant-friendly standard, the resolution of the issues remains the same.[7] Therefore, the Court ALLOWS Plaintiffs' cross-motion.

III. CONCLUSION

For the foregoing reasons, Defendants are not entitled to a § 3 exemption. At present, the Court makes no determination as to whether the rebuttable presumption under § 32L(2) has been met. Accordingly, Defendants' Motion for Partial Judgment on the Pleadings (Doc. No. 78) is DENIED, and Plaintiffs' Cross-Motion for Judgment on the Pleadings (Doc. No. 88)—striking Defendants' Fourth, Seventeenth, and Eighteenth Additional Defenses—is ALLOWED.

SO ORDERED.

/s/ Leo T. Sorokin
Leo T. Sorokin
United States District Judge

[7] The Court notes that no party has suggested that the resolution of either motion turns on in whose favor the Court draws inferences. Such is the case especially given that the dispositive questions are legal in nature.

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Date of JD/LLB	**May 19, 2024**
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Journal(s)	**The George Washington Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Arnold & Porter Government Contracts Moot Court**

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Prior Judicial Experience

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June 7, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a law student at The George Washington University Law School and will be graduating in May 2024. I am writing to apply for a judicial clerkship with you for the 2024-2025 term. I am enclosing a resume, law school transcript, and a writing sample. Also enclosed are letters of recommendation from Professor Peter Smith, Professor Katya Cronin, and Board Judge Marian Sullivan. I would be happy to provide additional information, including additional references, upon request. Thank you for your consideration.

Sincerely,

Ethan Syster

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EDUCATION

The George Washington University Law School — Washington, D.C.
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Honors: George Washington Scholar (Top 1%-15% of class to date); GPA: 3.979
Journal: *The George Washington Law Review*, Articles Editor
Activities: Research Assistant to Professor Peter Raven-Hansen (Spring 2023);
Arnold & Porter Government Contracts Moot Court (2023 Winner, 2024 Co-Chair);
Writing Fellow (2022-2023);
Government Contracts Student Association (President 2023-2024);
Alternative Dispute Resolution Board (Social Co-Chair 2022-2023)

The University of North Carolina at Chapel Hill — Chapel Hill, NC
B.A., *summa cum laude*, in Political Science and Economics — May 2021
Leadership: Honor System Outreach (Managing Editor);
Epsilon Tau Pi (Eagle Scout Service Fraternity) (Secretary)
Activities: Undergraduate Student Attorney General's Office; Carolina Union Activities Board

EXPERIENCE

The George Washington University Law School — Washington, D.C.
Student-Attorney for Civil Access to Justice Clinic, Family Law Division — (Upcoming) Fall 2023

Covington & Burling, LLP — Washington, D.C.
Summer Associate — May 2023 – Present

- Research legal issues including pro bono criminal matters, antitrust, and procurement law.
- Draft memoranda communicating research to supervising attorneys.
- Collaborate with attorneys and staff to research solutions to novel legal issues.

U.S. Court of Federal Claims — Washington, D.C.
Judicial Intern, Chambers of the Honorable David A. Tapp — January – April 2023

- Researched legal issues including takings law, administrative law, and procedural issues.
- Communicated legal research and analysis to clerks and the judge through legal memoranda.
- Edited and proofread judicial opinions, orders, and other communications.

U.S. Civilian Board of Contract Appeals — Washington, D.C.
Student Law Clerk — September – November 2022

- Researched legal issues including government contracts changes, delays, and terminations.
- Drafted memoranda assisting board judges in preparing for hearings and arbitrations.
- Worked collaboratively with clerks, board judges, and other staff to draft orders and opinions.

U.S. Department of Homeland Security, TSA, Office of the Chief Counsel — Washington, D.C.
Legal Intern (Acquisitions, Property, and Other Transactions) — May – July 2022

- Researched procurement law matters, including contract formation and administration issues.
- Wrote memoranda to communicate legal research and analysis to supervising attorneys.

INTERESTS

- Volunteering with the Boy Scouts of America (Eagle Scout).
- Volunteering with the Washington Lawyers' Committee Workers' Rights Clinic.
- Hiking the Appalachian Trail; Listening to true crime podcasts.

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

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SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2021			
	Law School		
	Law		
LAW 6202	Contracts Morant	4.00	B+
LAW 6206	Torts Suter	4.00	A
LAW 6212	Civil Procedure Smith	4.00	A+
LAW 6216	Fundamentals Of Lawyering I Cronin	3.00	A
Ehrs 15.00	GPA-Hrs 15.00	GPA 3.911	
CUM 15.00	GPA-Hrs 15.00	GPA 3.911	
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LAW 6209	Legislation And Regulation Smith	3.00	A
LAW 6210	Criminal Law Cottrol	3.00	A
LAW 6214	Constitutional Law I Fontana	3.00	A
LAW 6217	Fundamentals Of Lawyering II Cronin	3.00	A-
Ehrs 16.00	GPA-Hrs 16.00	GPA 3.854	
CUM 31.00	GPA-Hrs 31.00	GPA 3.882	
Good Standing			
DEAN'S RECOGNITION FOR PROFESSIONAL DEVELOPMENT			
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Fall 2022			
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LAW 6402	Antitrust Law Kovacic	3.00	A+
LAW 6502	Formation-Government Contracts Papson	3.00	A+
LAW 6666	Research And Writing Fellow Blinkova	2.00	CR
LAW 6668	Field Placement Mccoy	3.00	CR
LAW 6669	Judicial Lawyering Ortiz	2.00	A
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LAW 6515	Govt Contracts Moot Court	2.00	CR
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LAW 6667	Advanced Field Placement	0.00	CR
LAW 6668	Field Placement	2.00	CR
Ehrs 14.00	GPA-Hrs 8.00	GPA 4.083	
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Good Standing			
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LAW 6657	Law Review Note	1.00	----------
	Credits In Progress:	1.00	
Spring 2023			
LAW 6657	Law Review Note	1.00	----------
	Credits In Progress:	1.00	

********** CONTINUED ON PAGE 2 **********

Katie Cloud
Interim University Registrar

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Record of: Ethan Syster

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2023			
LAW 6230	Evidence	3.00	----------
LAW 6250	Corporations	4.00	----------
LAW 6419	Campaign Finance Law	2.00	----------
LAW 6506	Govt Contracts Cost&Pricing On	2.00	----------
LAW 6658	Law Review	1.00	----------
LAW 6711	Civil Access To Justice Clinic	2.00	----------
	Credits In Progress:	14.00	

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	58.00	47.00	187.00	3.979
OVERALL	58.00	47.00	187.00	3.979

########## END OF DOCUMENT ##########

Katie Cloud
Interim University Registrar

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1000 to 1999	Primarily introductory undergraduate courses.
2000 to 4999	Advanced undergraduate courses that can also be taken for graduate credit with permission and additional work.
5000 to 5999	Special courses or part of special programs available to all students as part of ongoing curriculum innovation.
6000 to 6999	For master's, doctoral, and professional-level students; open to advanced undergraduate students with approval of the instructors and the dean or advising office.
8000 to 8999	For master's, doctoral, and professional-level students.

All colleges and schools except the Law School, the School of Medicine and Health Sciences, and the School of Public Health and Health Services before Fall 2010 semester:

001 to 100	Designed for freshman and sophomore students. Open to juniors and seniors with approval. Used by graduate students to make up undergraduate prerequisites. Not for graduate credit.
101 to 200	Designed for junior and senior students. With appropriate approval, specified courses may be taken for graduate credit by completing additional work.
201 to 300	Primarily for graduate students. Open to qualified seniors with approval of instructor and department chair. In School of Business, open only to seniors with a GPA of 3.00 or better as well as approval of department chair and dean.
301 to 400	Graduate School of Education and Human Development, School of Engineering and Applied Science, and Elliott School of International Affairs – Designed primarily for graduate students. Columbian College of Arts and Sciences – Limited to graduate students, primarily for doctoral students. School of Business – Limited to doctoral students.
700s	The 700 series is an ongoing program of curriculum innovation. The series includes courses taught by distinguished University Professors.
801	This number designates Dean's Seminar courses.

The Law School

Before June 1, 1968:

100 to 200	Required courses for first-year students.
201 to 300	Required and elective courses for Bachelor of Laws or Juris Doctor curriculum. Open to master's candidates with approval.
301 to 400	Advanced courses. Primarily for master's candidates. Open to LL.B or J.D. candidates with approval.

After June 1, 1968 through Summer 2010 semester:

201 to 299	Required courses for J.D. candidates.
300 to 499	Designed for second- and third-year J.D. candidates. Open to master's candidates only with special permission.
500 to 850	Designed for advanced law degree students. Open to J.D. candidates only with special permission.

School of Medicine and Health Sciences and
School of Public Health and Health Services before Fall 2010 semester:

001 to 200	Designed for students in undergraduate programs.
201 to 800	Designed for M.D., health sciences, public health, health services, exercise science and other graduate degree candidates in the basic sciences.

CORCORAN COLLEGE OF ART + DESIGN

The George Washington University merged with the Corcoran College of Art + Design, effective August 21, 2014. For the pre-merger Corcoran transcript key, please visit http://go.gwu.edu/corcorantranscriptkey

THE CONSORTIUM OF UNIVERSITIES OF THE WASHINGTON METROPOLITAN AREA

Courses taken through the Consortium are recorded using the visited institutions' department symbol and course number in the first positions of the title field. The visited institution is denoted with one of the following GW abbreviations.

AU	American University	MMU	Marymount University
CORC	Corcoran College of Art & Design	MV	Mount Vernon College
CU	Catholic University of America	NVCC	Northern Virginia Community College
GC	Gallaudet University	PGCC	Prince George's Community College
GU	Georgetown University	SEU	Southeastern University
GL	Georgetown Law Center	TC	Trinity Washington University
GMU	George Mason University	USU	Uniformed Services University of the Health Sciences
HU	Howard University	UDC	University of the District of Columbia
MC	Montgomery College	UMD	University of Maryland

GRADING SYSTEMS

Undergraduate Grading System

A, Excellent; *B,* Good; *C,* Satisfactory; *D,* Low Pass; *F,* Fail; *I,* Incomplete; *IPG,* In Progress; *W,* Authorized Withdrawal; *Z,* Unauthorized Withdrawal; *P,* Pass; *NP,* No Pass; *AU,* Audit. When a grade is assigned to a course that was originally assigned a grade of *I,* the *I* is replaced by the final grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
Effective Fall 2011: The grading symbol RP indicates the class was repeated under Academic Forgiveness.
Effective Fall 2003: The grading symbol R indicates need to repeat course.
Prior to Summer 1992: When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I/* and the grade.
Effective Fall 1987: The following grading symbols were added*: A-, B+, B-, C+, C-, D+, D-.*
Effective Summer 1980: The grading symbols: *P,* Pass, and *NP,* No Pass, replace *CR,* Credit, and *NC,* No Credit.

Graduate Grading System

(Excludes Law and M.D. programs.) *A,* Excellent; *B,* Good; *C,* Minimum Pass; *F,* Failure; *I,* Incomplete; *IPG,* In Progress; *CR,* Credit; *W,* Authorized Withdrawal; *Z,* Unauthorized Withdrawal; *AU,* Audit. When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
Effective Fall 1994: The following grading symbols were added: *A-, B+, B-, C+, C-* grades on the graduate level.

Law Grading System

A+, A, A-, Excellent; *B+, B, B-,* Good; *C+, C, C-,* Passing; *D,* Minimum Pass; *F,* Failure; *CR,* Credit; *NC,* No Credit; *I,* Incomplete. When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.

M.D. Program Grading System

H, Honors; *HP,* High Pass; *P,* Pass; *F,* Failure; *IP,* In Progress; *I,* Incomplete; *CN,* Conditional; *W,* Withdrawal; *X,* Exempt, *CN/P,* Conditional converted to Pass; *CN/F,* Conditional converted to Failure. Through Summer 2014 the *I* was replaced with *I* and the final grade.

For historical information not included in the transcript key, please visit http://www.gwu.edu/transcriptkey

June 07, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write enthusiastically in support of Ethan Syster, a student at the George Washington University Law School who has applied to clerk in your chambers. Ethan was in my Civil Procedure class in Fall 2021 and my Legislation and Regulation class in Spring 2022. Ethan earned an A+ in Civil Procedure and an A in Legislation and Regulation. GW has a strict curve, and I give only a small number of solid A's, let alone A+'s. I was not surprised by Ethan's performance, however; he had consistently offered thoughtful insights during our class discussions. Ethan is a treat to have in class; he does not speak to hear his own voice, but when the class is struggling with a difficult concept, he will get the class back on the right track. Ethan's performance in my classes was not anomalous; his GPA is 3.95, which places him among a tiny number of students at the very top of the class.

Ethan has maintained this superlative level of academic performance while being fully engaged in the law school community outside of class. He is an Articles Editor on the Law Review, which is the most intellectually demanding and time-consuming position on the journal. He also served as a Writing Fellow, a prestigious position that requires excellence in that important craft. He has also served as a Peer Tutor for Civil Procedure and an officer-holder in the Government Contracts Student Association. Yet even though he has considerable demands outside of the classroom, Ethan has continued to receive top grades in his classes.

Ethan will come to a clerkship with meaningful legal experience under his belt. He will spend the summer after his second year of law school at Covington and Burling, a well-regarded firm in Washington, D.C. He spent the summer after his first year of law school in the Office of the Chief Counsel for the Transportation Security Administration at the U.S. Department of Homeland Security. In addition, he has externed during the academic semester—maintaining yet another ball in the air—at the U.S. Civilian Board of Contract Appeals and the U.S. Court of Federal Claims. I am sure that he will be able to hit the ground running in any clerkship.

Finally, Ethan is friendly, outgoing, and charming, and I am confident that he would be an excellent colleague. He is one of our very best. I warmly endorse Ethan Syster's clerkship application, and I hope that you will consider him carefully.

If you have any questions, please feel free to contact me.

Cordially,

Peter J. Smith
Professor of Law

Email: pjsmith1@law.gwu.edu
Office Phone: (202) 994-4797

June 07, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is my pleasure to write this letter in strong support of Ethan Syster's application for a clerkship in your chambers. I am writing in my capacity as Ethan's Fundamentals of Lawyering Professor. Fundamentals of Lawyering is GW Law's required first-year legal research and writing class, in which students spend two semesters learning numerous foundational skills for the practice of law. As such, I have come to know Ethan well over the course of his 1L year and have no doubt that he would be a great asset to your chambers.

Ethan was one of the top students in my class last year, across two sections. He is extremely bright and always up to any challenge. In the fall semester, for example, he was the only student in my sections who chose to argue for the more difficult position on his closed research memorandum. Despite starting from a disadvantaged position, Ethan produced an exceptional draft, which received the highest grade in the entire class. Ethan likewise did not shy away from taking on a difficult question in class and was always eager to participate and contribute to our discussions in a very thoughtful and meaningful way.

Ethan also has tremendous work ethic and can do well despite an exceedingly high workload. Throughout his time in my class, he completed every assignment well before the deadline, went above and beyond the basic requirements, and always turned in high quality work product. He is also highly self-motivated and seeks out opportunities both in and out of class to get involved in meaningful projects, to develop essential skills, and to help others. In addition to his summer internship after 1L, he also took on an externship in the Fall of his 2L year and a judicial internship in the Spring of 2L. Alongside being an articles editor for the GW Law Review, he also serves as a Writing Fellow, where he helps first-year students master the skills of legal research and writing and I routinely hear from my current students how patient, clear, and helpful he is to them. In short, anything that Ethan puts his mind to, he does exceptionally well and manages to balance it all with ease and grace.

What impresses me most about Ethan, however, is that his achievements and drive to succeed never come at the expense of others. Not only is he a kind, pleasant, and joyful person, but he is also very mindful of letting other people shine whenever possible and happily takes a back seat, accepts a more challenging assignment, or volunteers for a shorter deadline to make sure his classmates are in the best possible position. He is a natural born leader, inspiring people with his respectful yet sure approach. I have had the opportunity to observe Ethan in numerous group settings, both large and small, and he always naturally emerges as the one others want to follow and emulate.

Ethan's work ethic, curiosity, intrinsic motivation, intellectual rigor, and overall positive attitude make him an excellent candidate for a clerkship in your chambers and I have no doubt that he would greatly contribute to your work.

Thank you for the opportunity to enthusiastically recommend Ethan for this position. Please do not hesitate to contact me if you have any questions or concerns.

Sincerely,

Katya S. Cronin

Associate Professor
Fundamentals of Lawyering Program
The George Washington University Law School
katya_cronin@law.gwu.edu
(202) 494-8748

June 07, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write in support of Mr. Syster's application for a judicial clerkship. During the Fall 2022, Mr. Syster completed a twelve-week legal clerkship with the Civilian Board of Contract Appeals (CBCA), while he was a second-year student at George Washington University Law School. The CBCA is a board of twelve judges with jurisdiction to decide government contract disputes pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012), as well as other matters.

I am responsible for obtaining assignments and supervising the work of the law clerks. The assignments are substantively similar to the work expected in any judicial clerkship and require clerks to conduct legal research and draft orders, opinions, and legal memoranda. Clerks are attend hearings and arbitrations, and are also asked by the judges to participate in status conferences and other interactions with the parties in cases.

Mr. Syster received assignments from four judges on the Board, including myself, and completed six assignments. Mr. Syster wrote legal memoranda analyzing the applicability of different contract clauses in a construction contractor's delay claim and the merits of a motion to dismiss for lack of jurisdiction. Mr. Syster drafted decisions in an arbitration in which the Board was asked to review the denial of public assistance funds by the Federal Emergency Management Agency and on a Federal employee's appeal of a travel reimbursement decision.

We found Mr. Syster's work to be excellent. Mr. Syster's memoranda and draft decisions were well-written, well-organized, and well-researched. His thoughtful analysis assisted the judges in reaching the decisions in the respective cases. In two memoranda that he prepared for me in advance of a mediation, Mr. Syster correctly synthesized the legal principles applicable to the claims at issue and accurately assessed the strengths and weaknesses of the positions taken by the parties. In our discussions about his memoranda and the underlying case material, he articulated a sophisticated understanding of and approach to addressing the claims in mediation.

It was a pleasure to work with Mr. Syster. He is unfailingly professional and polite. His questions about assignments were clear, concise, and relevant. He completed his assignments promptly and demonstrated initiative by researching an additional issue he identified beyond the original parameters of one assignment. Mr. Syster will be an excellent judicial clerk and we highly recommend him for such a position.

Please contact me at (202) 606-8824 or through my chambers email address (sullivan.chambers@cbca.gov), if I may answer any questions or if you would like to speak with any of my colleagues about Mr. Syster's work for the CBCA.

Sincerely,

Marian E. Sullivan

Board Judge Civilian Board of Contract Appeals

ETHAN SYSTER
500 23rd St. NW Apt. B406 Washington, DC 20037 | (910) 685-6559 | ethansyster@law.gwu.edu

The following writing sample is the final draft of my Note submitted for consideration for publication in *The George Washington Law Review*. My Note addresses recent developments in organizational conflicts of interest in federal procurement and proposes regulatory changes that achieve an optimal balance of the competing interests involved. Throughout the year I received iterative feedback from my Journal Adjunct and Notes Editor but the underlying writing and reasoning are entirely my own.

Ethan Syster Final Draft

Business Risk and Competitive Integrity: A Discretionary Approach to Organizational Conflicts of Interest in Federal Procurement

Abstract

Organizational Conflicts of Interest ("OCIs") arise when a contractor performing work for the federal government may have an unfair competitive advantage or may appear to be unable to provide unbiased contract performance to the Government due to the contractor's organizational and contractual relationships with other persons, companies, or organizations. The OCI guidance in the Federal Acquisition Regulation ("FAR"), which provides policies and procedures for federal executive agencies' acquisitions, has not been meaningfully revised since it was first published in 1984. However, the federal procurement landscape has changed dramatically since then. Increased Government outsourcing has led to ever-complicated business relationships that strain the application of these outdated guidelines and leave both the Government and industry ill-prepared to address modern OCI challenges. The current situation leads to both over-deterrence that undermines the taxpayers' best value and under-deterrence that threatens the competitive integrity of the acquisition system. The recent Preventing Organizational Conflicts of Interest in Federal Acquisition Act ("Preventing OCIs Act") recognized this concern and directed the FAR Council to provide updated OCI guidance.

This Note urges the FAR Council to respond by adopting revised OCI guidance that reflects the realities of modern federal contracting. While reforms have been proposed both in 2011 and through the recent Preventing OCIs Act, these reforms are but a helpful starting point. This Note builds upon and distinguishes from these reforms by differentiating between OCIs that involve competitive integrity concerns and OCIs that involve Government business risk concerns.

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Introduction

The U.S. House of Representatives Committee on Oversight and Reform reported that McKinsey & Company ("McKinsey")'s "failure to disclose or meaningfully address" conflicts of interest[1] "may have contributed to one of the worst public health epidemics in our nation's history"—the opioid crisis.[2] The report detailed the Committee's findings that McKinsey, one of the world's largest and most renowned consulting firms,[3] had concerning conflicts of interest between its work for the U.S. Food and Drug Administration ("FDA") and large pharmaceutical companies on the opioid crisis.[4] The Committee found that McKinsey failed to disclose "serious, longstanding" conflicts of interest, used its federal contracts to solicit private sector business, and had at least twenty-two consultants working simultaneously for the FDA and opioid

[1] Conflicts of interest are more fully defined later in this Note. *See infra* note 22 and accompanying text. Black's Law Dictionary defines a conflict as interest as "a real or seeming incompatibility between one's private interests and one's public or fiduciary duties." *Conflict of Interest*, BLACK'S LAW DICTIONARY (11th ed. 2019). The House's report defined a conflict of interest as when "a contractor possesses, as the result of other business relationships, the incentive to provide biased advice under a government contract." STAFF OF H. R. COMM. ON OVERSIGHT & REFORM, 117TH CONG., MAJORITY INTERIM STAFF REPORT "THE FIRM AND THE FDA: MCKINSEY & COMPANY'S CONFLICTS OF INTEREST AT THE HEART OF THE OPIOID EPIDEMIC" 35 (Comm. Print. 2022) (citing Keith R. Szeliga, *Conflict and Intrigue in Government Contracts: A Guide to Identifying and Mitigating Organizational Conflicts of Interest*, 35 PUB. CONT. L.J. 639 (2006)).

[2] STAFF OF H. R. COMM. ON OVERSIGHT AND REFORM, *supra* note 1, at 52. For general information on the effect of the opioid crisis see Nat'l Institute for Occupational Safety & Health, *Opioids in the Workplace: Data*, CENTER FOR DISEASE CONTROL AND PREVENTION https://www.cdc.gov/niosh/topics/opioids/data.htmlhttps://www.cdc.gov/niosh/topics/opioids/data.html (last visited Apr. 5, 2023) (describing increasing drug overdose deaths largely attributable to synthetic opioids). *See also* LM Rossen et al., *Provisional Drug Overdose Death Counts*, NATIONAL CENTER FOR HEALTH STATISTICS, https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htmhttps://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm (last visited Feb. 26, 2023).

[3] *See McKinsey Today*, MCKINSEY & COMPANY, https://www.mckinsey.com/about-us/overview/mckinsey-today (last visited Apr. 5, 2023) (describing McKinsey's work for "90 of the top 100 companies" as the company has doubled in size over the last 10).

[4] *See generally* STAFF OF H. R. COMM. ON OVERSIGHT AND REFORM, *supra* note 1, at 52 (describing how the House Oversight Committee found McKinsey had "overlapping and conflicting" work for FDA and opioid manufacturers).

manufacturers.[5] McKinsey ultimately entered into a settlement agreement with numerous state attorneys general because McKinsey's potential conflict "appear[ed] potentially to have violated federal law and contract requirements."[6] While the direct effects of McKinsey's potential conflict on the opioid crisis may never be quantifiable, it is possible that this conflict contributed to the large number of deaths caused by the opioid crisis.[7] In the year 2021, for example, 80,411 peopled died of an overdose involving an opioid—a significant increase from the 21,089 opioid overdose deaths in the year 2010.[8] Congress responded swiftly to the Committee on Oversight and Reform's investigation, with the Preventing Organizational Conflicts of Interest in Federal Acquisition Act ("Preventing OCIs Act") [9] directing amendments to be made to the Federal Acquisition Regulation ("FAR")'s[10] organizational conflict of interest ("OCI ") guidance. However, it is unclear when, if ever, the statute's purpose of establishing revised OCI guidance will be fulfilled as rulemaking in this area frequently takes years.[11]

Although McKinsey's potential conflict made news headlines,[12] other recent examples of OCIs that were not discussed in the news reveal a much deeper problem in the current OCI

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[5] *Id.* at 3-5.
[6] *Id.* at 52 (citing Commonwealth of Massachusetts, *Assented-To Motion for Entry of Judgment*, available at www.mass.gov/doc/massachusetts-mckinsey-consent-judgment (Feb. 4, 2021)).
[7] Nat'l Institute for Occupational Safety & Health, *supra* note 2; *see also* LM Rossen et al., *supra* note 2.
[8] *Drug Overdose Death Rates*, NATIONAL INSTITUTE ON DRUG ABUSE, Figure 3, https://nida.nih.gov/research-topics/trends-statistics/overdose-death-rates#:~:text=Opioid%2Dinvolved%20overdose%20deaths%20rose,with%2080%2C411%20reported%20overdose%20deaths (last visited Feb. 26, 2023).
[9] Preventing Organizational Conflicts of Interest in Federal Acquisition Act, Pub. L. No. 117-324, 136 Stat. 4439 (2022).
[10] The Federal Acquisition Regulation ("FAR") provides policies and procedures for federal executive agencies' acquisitions. *See* FAR 1.101 (1986) ("The Federal Acquisition Regulations System is established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies.")
[11] *See, e.g.*, *infra* Section I.C (discussing the 2011 proposed OCI guidance that was ultimately withdrawn 10 years later, in 2021).
[12] *See, e.g.*, Kevin Dunleavy, *Lawmakers Blast McKinsey for 'Serious Conflict of Interest' in Opioid Consulting*, FIERCE PHARMA (Apr. 15, 2022, 10:56 AM), https://www.fiercepharma.com/pharma/mckinsey-under-scrutiny-congress-serious-conflict-interesthttps://www.fiercepharma.com/pharma/mckinsey-under-scrutiny-congress-serious-conflict-interest; Ian MacDougall, *Congress Passes Bill to Rein in Conflicts of Interest for Consultants Such as*

guidance. For example, in *NetStar-1 Government Consulting, Inc. v. United States*,[13] both the disappointed offeror who brought the bid protest[14] and the contract awardee were determined to have conflicts of interest based upon their access to nonpublic competitively useful information gained under other contracts with the same agency.[15] There, unlike in the case of McKinsey, the concern was the integrity of the competitive acquisition process at the time of contract award, rather than the risk of unsuccessful contract performance due to contractor bias throughout the life of the resulting contract.[16] The U.S. procurement system places a high value on competition in the structure and procedure of the acquisition process.[17]

While these examples may make it easy to call for stricter conflict of interest rules, the answer is not that simple. Rather, policymakers must also consider that the very reasons these contractors have these conflicts of interest is also the reason the Government seeks their services: experience and expertise.[18] Unfortunately the FAR offers little guidance on how agencies are to

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McKinsey, PROPUBLICA (Dec. 16, 2022, 1:30 PM), https://www.propublica.org/article/congress-mckinsey-fda-purdue-pharma-conflictshttps://www.propublica.org/article/congress-mckinsey-fda-purdue-pharma-conflicts; Soo Rin Kim & Lucien Bruggeman, *Report Sheds Light on McKinsey's Alleged Conflicts of Interest*, ABCNEWS (Apr. 14, 2022, 7:45 AM), https://abcnews.go.com/US/report-sheds-light-mckinseys-alleged-conflicts-interest/story?id=84059749.

[13] 101 Fed. Cl. 511, 516 (2011), aff'd, 473 F. App'x 902 (Fed. Cir. 2012); *see infra* notes 124-135 and accompanying text.

[14] A bid protest is an adjudicative process by which interested parties can challenge an agency's award decision. *See generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-510SP, *Bid Protests at GAO: A Descriptive Guide* (2018); FAR Subpart 33.1, 48 C.F.R. § 33.102 (2014). Interested parties can file a protest with the agency that took the challenged procurement action, the Government Accountability Office ("GAO"), or the U.S. Court of Federal Claims. FAR Subpart 33.1, 48 C.F.R. § 33.102 (2014). While there are differences between these fora that may affect a contractor's choice as to where to bring a protest these differences are largely unrelated to this Note as the GAO and Court of Federal Claims have similar standards of review for OCIs. *See* Michael J. Schaengold, et al., *Choice of Forum for Federal Government Contract Bid Protests*, 18 FED. CIR. B.J. 243, 245-248 (2009).

[15] *NetStar-1 Gov't Consulting, Inc.*, 101 Fed. Cl. at 516; *see infra* notes 124-135 and accompanying text.

[16] *See infra* Section III.A.

[17] *See* 41 U.S.C. § 3301 (requiring full and open competition in federal procurements); FAR 1.102(b)(iii) (2021) (stating that the Federal Acquisition system will "satisfy the customer in terms of cost, quality, and timeliness of the delivered product or service by promoting competition"); Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 PUB. PROCUREMENT 103, 104 (2002) (describing competition, integrity, and transparency as the "three overarching principles" of procurement law).

[18] *See, e.g.*, 48 C.F.R. § 209.571-3 (2010) ("Contracting officers generally should seek to resolve organizational conflicts of interest in a manner that will promote competition and preserve DOD access to the expertise and

balance these competing interests, leading to both under-deterrence, awarding of contracts to firms with significant potential conflicts of interest, and over-deterrence, failing to award contracts to firms where a potential conflict of interest could have been waived, mitigated, or otherwise resolved.[19] This Note proposes revised guidance that provides agencies with the necessary framework to identify OCIs and adequately balance these competing interests in addressing potential conflicts.[20] Specifically, this Note suggests a distinction between OCIs that implicate government business risk and those that implicate competitive concerns. This Note proposes that OCIs involving government business risk are more appropriately suited for the Government to consider whether waiver is proper because the primary concern is the Government's own interests. OCIs that involve a risk to the integrity of the competitive process, however, should not be waived. because these conflicts involve the contractor's interests in the opportunity for competitive award of the contract.

Part I provides background on OCIs, federal outsourcing, and reforms to OCI guidance proposed both in 2011 and through recent legislative action. Part II then analyzes why the current FAR guidance is outdated, specifically identifying gaps between the outdated guidance and modern realities, and why the 2011 proposed solutions are a helpful starting point. Finally, Part III proposes revised guidance that would allow agencies to recognize the tradeoff between risk of

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experience of qualified contractors."); Fred W. Geldon & Caitlin Conroy, *Is the OCI Pendulum Swinging Back at GAO?*, 18-13 BRIEFING PAPERS 1, 13 (2018) ("Watch out for Catch-22: the reason you want the contractor to perform the work may be the precise reason why there is an OCI that cannot be mitigated. Balance the need for expertise with the need for impartiality"); Robert S. Metzger, *Final DFARS OCI Rules*, PILLSBURY, (Jan. 11, 2011), https://www.pillsburylaw.com/images/content/3/4/v2/3449/CorporateSecuritiesAdvisoryFinalDFARSOCIRules01052011final.pdf (describing how contracting officers "default[ing]" to "avoidance or 'restrictions on future contracting,'" would have negative results by denying access "to the most capable and best informed contractors"); Jon W. Burd, *Do We Still Need OCI Reform?*, WILEY (2015), https://www.wiley.law/newsletter-5228 (describing the benefits of "Government discretion to accept the business risk of a contractor's impaired judgment").

[19] *See* Ralph C. Nash Jr., *Organizational Conflicts of Interest: An Increasing Problem*, 20 NASH & CIBINIC REP. ¶ 24, May 2006 (describing the inadequacies of the FAR guidance); FAR Subpart 9.5, 48 C.F.R. § 9.500 Organizational and Consultant Conflicts of Interest (current guidance).

[20] *See generally infra* Part III.

bias and benefit of expertise in OCIs that pose a risk to successful contract performance while preserving the protection against threats to the integrity of the competitive process presented by other OCIs. Specifically, Part III expands upon how the FAR Council should give effect to Congress's mandate to issue revised OCI guidance through a distinction between business risk and competitive integrity OCIs.

I. The Context: Increasing Conflicts and a History of Failed Proposals

The modern realities of Government contracting are significantly different from the context of the adoption of FAR OCI guidance in 1984. This Part describes the current guidance, trends that have challenged the vitality of the current guidance, and proposed reforms.

A. Current OCI Guidance: "You figure it out"[21]

The FAR defines an OCI as a situation where "a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage" because of "other activities or relationships with other persons."[22]

The Government Accountability Office ("GAO"),[23] in *Aetna Government Health Plans, Inc.* [24] divided OCIs into three categories ("Aetna categories"): (1) biased ground rules, (2)

[21] Nash, *supra* note 19, at 1.
[22] FAR 2.101 (2023). It is accepted that the word "person" here refers to a company or organization. Ralph C. Nash & John Cibinic, 15 NASH & CIBINIC REP. ¶ 5, 13-14 (Jan. 2001). In fact, the FAR distinguishes an OCI from a personal conflict of interest ("PCI") which is defined as "a situation in which a covered employee has a financial interest, personal activity, or relationship that could impair the employee's ability to act impartially and in the best interest of the Government when performing under the contract," and is not the subject of this Note. FAR 3.1101 (2011). For a discussion of the need for PCI reform see Kathleen Clark, *Ethics for an Outsourced Government*, 5 (Wash. Univ. in St. Louis Legal Stud. Rsch. Paper No. 11-05-03, 2011), https://ssrn.com/abstract=1840629https://ssrn.com/abstract=1840629, at 31.
[23] The GAO is one forum where bid protests can be litigated. *See supra* note 14.
[24] B-254397, 95-2 CPD ¶ 129, at 11-12 (Comp. Gen. July 27, 1995).

unequal access to information, and (3) impaired objectivity.[25] While the FAR has not explicitly adopted this framework, the examples provided in the FAR largely follow these same broad contours.[26] A biased ground rule OCI occurs when a firm's contract for acquisition support services raises the possibility that the firm could gain an unfair competitive advantage in competing for a contract for which it develops the requirements or other procurement specifications. [27] In *International Business Machines Corp.*,[28] the GAO found that there was a biased ground rule OCI and held that the agency was proper in its elimination of a contractor who had previous involvement in developing the statement of work, solicitation, and other "key acquisition documents" for a contract the contractor was now seeking to compete for.[29] An unequal access to information OCI occurs when a contractor has access to nonpublic competitively useful information that may give the contractor an unfair competitive advantage.[30] For example, the OCI in *NetStar-1 Government Consulting, Inc.* was based upon the contractor's access to a budget plan under a previous contract which was nonpublic and competitively useful information for the contract that it was now competing for.[31] There is often considerable overlap in these first two categories as most examples of biased ground rule OCIs also inherently involve unequal access to information.[32] Finally, an impaired objectivity OCI occurs when a contractor's

[25] *Id.* at 11-12. *See* Daniel I. Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, 35 PUB. CONTRACT L.J. 25, 32 (2005) (describing the *Aetna* categorization and its further implementation by the GAO).
[26] *See generally* FAR 9.505 (2019) (outlining the procedures regarding OCIs and several common hypothetical examples).
[27] *Aetna Gov't Health Plans, Inc.*, 95-2 CPD ¶ 129, at 9; Michael J. Farr, *Organizational Conflicts of Interest (OCIs) What Every Contract Law Attorney Needs to Know*, 42 THE REPORTER 44, 46 (2015).
[28] B-410639, et al., 2015 CPD ¶ 41, at 1 (Comp. Gen. Jan. 15, 2015).
[29] *Id.* at 1.
[30] *Aetna Gov't Health Plans, Inc.*, 95-2 CPD ¶ 129, at 8; Farr, *supra* note 27, at 46.
[31] *NetStar-1 Government Consulting, Inc. v. United States*, 101 Fed. Cl. 511, 524 (2011), aff'd, 473 F. App'x 902 (Fed. Cir. 2012) (holding that a contractor's access to the budget execution plan created an unequal access to information in a contract to provide management support services).
[32] For example, the biased ground rule OCI in *International Business Machines Corp.*, 2015 CPD ¶ 41, could be considered an unequal access to information OCI as well as the contractor likely gained nonpublic competitively useful information in developing the underlying solicitation documents. However, the unequal access to information

performance could be biased by its other contracts or business interests.[33] Specifically, in *Alion Science & Technology Corp.*,[34] the GAO sustained a protest where the awardee would have analyzed and evaluated policies and regulations that directly affected the awardee and its competitors.[35]

The first two categories, biased ground rules and unequal access to information, focus upon the fairness of the acquisition process, whereas the final category, impaired objectivity, is concerned with the business risk of unsuccessful contract performance to the Government posed by the potential for biased contractor judgment.[36] Both academic commentators and the GAO have recently focused upon the third category, impaired objectivity, because impaired objectivity OCIs can be difficult to identify.[37] This is due to the wide range of activities which may bias a contractor's judgment and contracting officers[38] must rely upon information that only the contractor may have.[39] The FAR describes two "underlying principles" supporting OCI policy: (1) preventing conflicts that may bias contractor judgment, and (2) preventing unfair competitive advantage.[40] The *Aetna* categories give effect to the two principles underlying FAR OCI guidance.

OCI in *Netstar-1 Gov't Consulting, Inc.*, 101 Fed. Cl. at 524, likely was not also a biased ground rules OCI because the previous contract giving rise to the conflict was not a contract for acquisition support services.

[33] *See Aetna Gov't Health Plans, Inc.*, 95-2 CPD ¶ 129 at 1 (finding an impaired objectivity OCI to exist "where an affiliate of one offeror's major subcontractor evaluates proposals for the procuring agency."); Farr, *supra* note 27, at 47.

[34] B-297342, 2006 CPD ¶ 1 (Comp. Gen. Jan. 9, 2006).

[35] *Id.* at 7-8/

[36] *See* Christopher R. Yukins, *The Draft OCI Rule—New Directions and The History of Fear*, 53 GOV'T CONTRACTOR 18 ¶ 148, at 4 (2011) (distinguishing between OCIs that threaten competitive fairness and OCIs that raise the risk of biased contract performance).

[37] *See* Megan A. Bartley, *Too Big to Mitigate? The Rise of Organizational Conflicts of Interest in Asset Management*, 40 PUB. CONT. L.J. 531, 539 (2011) (discussing the concern for impaired objectivity OCIs); Yukins, supra note 36, at 2 (noting that "impaired objectivity OCIs appeared to trigger the most concern at GAO.").

[38] The FAR defines a contracting officer as "a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings." FAR 2.101 (2023).

[39] *See* Bartley, *supra* note 37, at 539; Yukins, *supra* note 36, at 2.

[40] FAR 9.505 (2019).

The FAR requires that agencies "identify and evaluate" potential OCIs and "avoid, neutralize, or mitigate" significant potential OCIs prior to award.[41] This requirement is based upon the federal acquisition system's focus on competition, integrity, and transparency.[42] Scholars argue that the specific focus of the OCI rules has shifted over time from an original fear of unequal access to information to a concern for the effect of impaired objectivity OCIs.[43] Fears of unequal access to information OCIs arise from the procurement system's focus on competition.[44] The Competition in Contracting Act[45] ("CICA") requires full and open competition in most government procurements and competition is a core policy goal of the U.S. acquisition system.[46] This goal arises from the theory that maximizing competition allows the government to receive its best value in terms of price and quality.[47] The system promotes competition by demonstrating that "competitors will be impartially considered for award" of government contracts.[48] Impaired objectivity OCIs often arise out of a concern for the potential

[41] FAR 9.504 (1991).
[42] *See* Farr, *supra* note 27, at 49-50 (discussing OCIs through the concern for ensuring integrity and fair competition); Schooner, *supra* note 17, at 104 (describing competition, integrity, and transparency as the "three overarching principles" of procurement law); Gordon, *supra* note 25, at 41 (framing OCIs as an issue of integrity).
[43] *See* Yukins, *supra* note 36, at 1-2 (explaining how OCIs grew out of a concern for unequal access to information but have since shifted to impaired objectivity OCIs). For a historical perspective of OCIs see Adam Yarmolinsky, *Organizational Conflicts of Interest*, 24 FED. B.J. 309 (1964) (discussing OCIs as they relate to defense research and development contracts in the 1960s).
[44] *See* Yukins, *supra* note 36, at 1 (describing the concern that "large weapon system integrators, which dominated the military-industrial complex at that time, would control competitions by controlling critical design information– they would gain "unequal access to information.").
[45] 41 U.S.C. § 3301.
[46] *Id.*; *see also* FAR 1.102(b)(iii) (2021) (stating that the Federal Acquisition system will "satisfy the customer in terms of cost, quality, and timeliness of the delivered product or service by promoting competition").
[47] Schooner, *supra* note 17, at 104 (describing competition, as a core principle of the U.S. procurement system and explaining that such a principle is based upon Adam Smith's theory that individuals pursuing their self-interest in the marketplace will result in better outcomes for all market participants) (citing Adam Smith, *The Wealth of Nations* (ed. Edwin Canaan, University of Chicago Press, 1976)).
[48] *Id.* at 104.

of unsuccessful contract performance due to biased judgment, rather than competitive concerns.[49]

Current FAR guidance requires a high burden to establish a significant potential OCI and contracting officers have substantial discretion in addressing OCIs. The FAR only requires that *significant* potential conflicts of interest be resolved through avoidance, neutralization, or mitigation.[50] Further, the standard required to prove an OCI is "hard facts" rather than "mere inference or suspicion."[51] Agencies also have the option of unilaterally waiving a significant potential conflict of interest if it is in the Government's interest.[52] Courts and the GAO give great deference to agency discretion in determining when waiver of an OCI is in the Government's interest.[53] Notably, the GAO typically sustains bid protests[54] when an agency failed to conduct a thorough evaluation of a potential OCI rather than when an agency conducted

[49] *See* Yukins, *supra* note 36, at 2; Federal Acquisition Regulation; Organizational Conflicts of Interest, 76 Fed. Reg. 23,236 (Apr. 26, 2011) (distinguishing between harms to competitive integrity and harms to Government business interests); *infra* Section III.A.

[50] FAR 9.504 (1991); *see also Turner Construction Co. v. United States*, 645 F.3d 1377, 1386 (Fed. Cir. 2011) ("The FAR therefore requires mitigation of 'significant potential conflicts,' but does not require mitigation of other types of conflicts, such as apparent or potential non-significant conflicts.").

[51] *Deloitte Consulting LLP*, B-420137.7, et al., 2022 CPD ¶ 200, at 7 (Comp. Gen. July 25, 2022) (requiring "hard facts" to find an OCI); Farr, *supra* note 27, at 49 (further explaining the "hard facts" standard); *VSE Corp.*, B-404833.4, 2011 CPD ¶ 268, at 26 (Comp. Gen. Nov. 21, 2011) (recommending "that the [contracting officer] reconsider the available information, and obtain any new information necessary, to establish the 'hard facts'").

[52] FAR 9.503 (2022).

[53] *See, e.g.*, *CACI, Inc., et al*., B-413860.4, et al, 2018 CPD ¶ 17, at 1 (Comp. Gen. Jan. 5, 2018) (denying a protest alleging that the agency's waiver was improper because the waiver was not issued until after award); *see also Ares Technical Services Corp.*, B-415081.2, et al., 2018 CPD ¶ 153, at 4 (Comp. Gen. May 8, 2018) ("while [GAO] will review an agency's execution of an OCI waiver, [GAO's] review is limited to consideration of whether the waiver complies with the requirements of the FAR, that is, whether it is in writing, sets forth the extent of the conflict, and is approved by the appropriate individual within the agency."); *Steel Point Solutions, LLC*, B-419709.3, 2022 CPD ¶ 14, at 3-4 (Comp. Gen. Dec. 21, 2021) (affirming this understanding of GAO's role in the OCI waiver review process); Gordon, *supra* note 25, at 37 (describing the FAR's provisions allowing for agency waiver of OCIs); Burd, *supra* note 18.

[54] For a description of the bid protest process see *supra* note 14.

such an evaluation and determined that the potential OCI was not significant or could be resolved.[55]

Once an agency determines a significant potential OCI exists, the agency must—if it does not waive the OCI—take action to resolve the OCI by mitigating, avoiding, or neutralizing the conflict.[56] The contractor can mitigate OCIs through information firewalls or work allocation firewalls.[57] The Government can avoid an OCI, for example, by reducing the statement of work to remove the conflicted work from the scope of the contract, and then either perform the work in-house or under a different contract.[58] Agencies, similarly, may neutralize the conflict by disqualifying the contractor from current or future work.[59] Contracting officers can use OCI clauses in the solicitation and require submission of OCI mitigation plans with, or in advance of, proposal submission, to accomplish their dual mandate of identifying potential conflicts and resolving significant potential conflicts.[60] However, current FAR guidance does not require that an agency include a solicitation provision requiring disclosure of potential OCIs in most instances.[61] Rather the FAR only requires the inclusion of such a clause when the contracting officer determines that the particular acquisition involves a significant potential conflict of

[55] *See generally*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-520SP, GAO BID PROTEST OVERVIEW 7-8 (2011), https://www.gao.gov/assets/gao-12-520sp.pdf.
[56] FAR 9.504(a)(2) (1991); Gordon, *supra* note 25, at 37-39 (describing agency actions required by the FAR to address OCIs).
[57] *See, e.g.*, *Alion Sci. & Tech. Corp.*, B-297022.4, 2006 CPD ¶ 146 (2006) (finding that a conflict of interest had been mitigated where the agency and contractor had implemented a firewall that included a subcontractor performing the conflicting work).
[58] James Jurich, *International Approaches to Conflicts of Interest in Public Procurement: A Comparative Review*, 7 EUROPEAN PROCUREMENT & PUB. PRIVATE PARTNERSHIP L. REV. 242, 251 (2012).
[59] *Lucent Technologies World Services, Inc.*, B-295462, 2005 CPD ¶ 55 (Comp. Gen. 2005) (denying a bid protest by the excluded offeror where the agency reasonably determined a significant potential OCI to exist).
[60] FAR 9.504 (1991); FAR 9.507 (1990).
[61] *See generally* FAR Subpart 9.5 (1990).

interest.[62] Moreover, even when such a provision or clause is included, it typically does not require ongoing disclosure of potential OCIs throughout the performance of the contract.[63]

The current guidance provides contracting officers with several different mechanisms for resolving OCIs but little guidance on how to apply these mechanisms based upon the different concerns raised by different types of OCIs.[64] Rather, the FAR notes that "[t]he exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it."[65] As Ralph C. Nash Jr., a leading government procurement scholar points out, this tells readers nothing more than "[y]ou figure it out."[66]

B. Government Outsourcing

The problems resulting from the lack of guidance on OCIs have been exacerbated by government outsourcing. Political pressure to downsize the federal Government has led to increased outsourcing in the form of higher federal spending on service contracts and therefore greater potential for conflicts of interest.[67] In addition to these political pressures, efforts to address the skills gaps in the federal workforce identified by the GAO, have led to increased government outsourcing.[68] A February 2023 GAO report found that the federal government

[62] FAR 9.506(b)(2) (2022)
[63] *See generally* FAR Subpart 9.5 (1990).
[64] *See generally id.*
[65] FAR 9.505 (2019).
[66] Nash, *supra* note 19, at 1.
[67] *See* Steven L. Schooner & Collin D. Swan, *Suing the Government as a 'Joint Employer' –Evolving Pathologies of the Blended Workforce*, 52 GOV'T CONTRACTOR 39 ¶ 341, 2-3 (Oct. 2010) (describing how political efforts to downsize the federal Government have led to increases in federal service contracts); Gordon, *supra* note 25, at 26 (describing Government outsourcing, particularly of services requiring the exercise of judgment, as one of multiple reasons for increasing OCIs).
[68] *See* Schooner & Swan*, supra* note 67, at 2; Laura Dickinson, *Outsourcing Covert Activities*, 5 J. NAT'L SECURITY L. & POL'Y 521, 524 (2012) ("a political culture that assumes the efficiency of the private sector (without necessarily accumulating data to prove it) makes the hiring of contract workers much easier politically than expanding the number of Government employees").

generally, and the Office of Personnel Management ("OPM") specifically, suffered from a skills gap, particularly in areas of human resources, cybersecurity and acquisition.[69] The report notes that "strategic human capital management, specifically . . . government-wide and agency specific skills gaps, has been on GAO's High-Risk List since 2001."[70] This increase in federal service contracts leads to a heightened potential for conflicts of interest.[71] The phenomenon has been described as a "blended workforce" in which "contractors work alongside, and often are indistinguishable from, their Government counterparts."[72] Estimates suggest that more than 300,000 service contractor jobs were created between 1990 and 2002.[73] This trend has only increased with the Government spending nearly 60% of contract dollars on service contracts in fiscal year 2020.[74] Further, recent increases in the Government's use of temporary service contracts have led to additional instances of contractor personnel working alongside federal Government employees, often on a short-term basis to fulfill skills or other personnel gaps within the Government workforce, rather than on a long-term basis.[75] As the Government continues to rely upon additional service contractors, there will continue to be increased risk of potential organizational conflicts of interest.

[69] U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105528, FEDERAL WORKFORCE: OPM ADVANCES EFFORTS TO CLOSE GOVERNMENT-WIDE SKILLS GAPS BUT NEEDS A PLAN TO IMPROVE ITS OWN CAPACITY 18 (2023).
[70] *Id.* at 1.
[71] *See* Clark, *supra* note 22, at 31 (arguing that additional personal conflict of interest rules are needed in response to the federal Government's reliance on personal service contracts); *see also* Gordon, *supra* note 25, at 26.
[72] Schooner & Swan, *supra* note 67, at 1.
[73] *Id.* at 2.
[74] *A Snapshot of Government-wide Contracting for FY 2020*, U.S. GOV'T ACCOUNTABILITY OFF., (June 22, 2021), https://www.gao.gov/blog/snapshot-Government-wide-contracting-fy-2020-infographichttps://www.gao.gov/blog/snapshot-Government-wide-contracting-fy-2020-infographic.
[75] *See* Chris Schwartz and Laura Padin, *Temping Out the Federal Government*, NAT'L EMP. L. PROJECT, (2019) https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Temping-Out-Federal-Government-6-19.pdfhttps://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Temping-Out-Federal-Government-6-19.pdf (describing the Government's use of temporary service contracts).

C. 2011 Proposed Solutions and Recent Legislation

Many commentators and practitioners recognized the increased risk of conflicts of interest due to Government outsourcing in 2011, which led to an opportunity for reform.[76] The GAO issued a report identifying the need for OCI reform and urging the FAR Council[77] to take up the issue.[78] Specifically, the GAO recognized that the procurement community needed additional guidance on addressing contractors' access to sensitive information.[79]. In response to the concerns regarding conflicts of interest resulting from contractor's access to sensitive information raised in the 2010 GAO report, the FAR Council issued a proposed rule for notice and comment.[80] Importantly, the proposed rule would similarly have abandoned the *Aetna*[81] categories and focused on differentiating between OCIs that pose a risk to the competitive acquisition process and those that pose a business risk to the Government as FAR 9.505

[76] *See* Jurich, *supra* note 58, at 250 (discussing 2011 proposed rules).
[77] The FAR Council, which is made up of the Secretary of Defense, the Administrator of General Services ("GSA"), and the Administrator of the National Aeronautics and Space Administration ("NASA"), is responsible for updating and maintaining the FAR through administrative rulemaking. *See* FAR 1.103(b) (2014) ("The FAR is prepared, issued, and maintained, and the FAR System is prescribed jointly by the Secretary of Defense, the Administrator of General Services, and the Administrator, National Aeronautics and Space Administration, under their several statutory authorities."). However, the FAR Council sometimes acts in response to issues raised in a GAO report, direction from Congress, public or industry pressure, as well as the executive branch's Office of Federal Procurement Policy. *See* KATE M. MANUEL, ET AL., CONG. RSCH. SRVC., R42826, THE FEDERAL ACQUISITION REGULATION (FAR): ANSWERS TO FREQUENTLY ASKED QUESTIONS 15-19 (2015) (describing the stakeholders involved in federal regulation of government procurement). All of these stakeholders play a role in the development of acquisition policy. *Id.* at 15-19.
[78] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-693, STRONGER SAFEGUARDS NEEDED FOR CONTRACTOR ACCESS TO SENSITIVE INFORMATION 30 (2010) (recommending that the FAR council examine the need for additional guidance regarding unequal access to information OCIs).
[79] *Id.* at 30.
[80] Federal Acquisition Regulation; Organizational Conflicts of Interest, 76 Fed. Reg. 23,236 (Apr. 26, 2011). Notably, the revised guidance was principally authored by Dan Gordon—the same GAO attorney who authored the *Aetna* decision establishing the three categories of OCIs. *Aetna Gov't Health Plans, Inc.*, 95-2 CPD ¶ 129.
[81] These three categories are (1) biased ground rules, (2) unequal access to information, and (3) impaired objectivity. *See supra* note 25 and accompanying text.

provides.[82] Further, the proposed rule would have moved the OCI provisions to FAR Part 3, which addresses improper business practices.[83]

Under the proposed rule, contracting officers would have greater discretion to accept the risks posed by impaired objectivity OCIs, out of recognition that such a decision is based upon business judgment rather than a threat to the integrity of the procurement process.[84] The proposed rule was ultimately withdrawn in 2021.[85] The GAO report listed its recommendations as closed when the proposed rule was announced.[86] However, given that the rule was never implemented, these concerns surrounding increased instances of OCI challenges, particularly those involving contractor access to sensitive information, still exist and have been exacerbated by increased outsourcing in the years since.[87] Thus, this is an area where proposed solutions have laid dormant for years and ultimately remain unenacted.

The Defense Federal Acquisition Regulation Supplement ("DFARS"),[88] which governs acquisitions within the Department of Defense ("DOD"), was amended in 2011 to address OCI

[82] Federal Acquisition Regulation; Organizational Conflicts of Interest, 76 Fed. Reg. 23,236 (Apr. 26, 2011).
[83] *Id.*; Yukins, *supra* note 36, at 2 (arguing that the focus upon impaired objectivity OCIs reflects shifting concern among policymakers and the procurement community).
[84] Yukins, *supra* note 36, at 2 (discussing the different concerns underlying waiver of impaired objectivity OCIs); Federal Acquisition Regulation; Organizational Conflicts of Interest, 76 Fed. Reg. 23,236 (Apr. 26, 2011).
[85] Federal Acquisition Regulation; Organizational Conflicts of Interest, 86 Fed. Reg. 14,863 (Mar.19, 2021) (withdrawing the 2011 proposed rule). It is not clear why the rules were never enacted. Speculatively, it may be because the proposed rule's author, Dan Gordon, retired from government service in 2011, leaving the rules without an advocate to shepherd them through the oft unsuccessful process of notice-and-comment rulemaking. *See White House Administrator Joins Law School*, GWTODAY (Nov. 2, 2011), https://gwtoday.gwu.edu/white-house-administrator-joins-law-schoolhttps://gwtoday.gwu.edu/white-house-administrator-joins-law-school (discussing Gordon's retirement from government service); *see generally* Jason Webb Yackee, Susan Webb Yackee, *From Legislation to Regulation: An Empirical Examination of Agency Responsiveness to Congressional Delegations of Regulatory Authority*, 68 ADMIN. L. REV. 395 (2016) (discussing the theory of ossification of administrative law due to increasing judicial requirements for agency rulemaking and finding that agencies only issue binding regulations in response to 41% of statutory authorizations).
[86] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 78, at 30.
[87] *Id.* at 30. For a discussion of Government outsourcing see *supra* Section I.B.
[88] Several agencies have their own agency-specific supplements to the FAR that impose additional requirements upon agency acquisitions. *See, e.g.*, 48 C.F.R. § 201.301 (2015) (Department of Defense Acquisition Regulation Supplement); 48 C.F.R. § 401.000 (1996) (Agriculture Acquisition Regulation Supplement). For a discussion of the relationship between agency supplements and the far see MANUEL ET AL., *supra* note 77, at 19.

concerns but did not include the robust amendments initially proposed in 2010.[89] Some argued the difference between the proposed and implemented DFARS rule was in anticipation of the 2011 proposed changes to the FAR, which would apply to DOD and civilian agencies.[90]

Following the withdrawal of the 2011 proposed rule in 2021, and the House Oversight Committee's report on McKinsey, there has been renewed congressional attention on the issue of conflicts of interest in federal procurement.[91] Specifically, the Preventing OCIs Act—which directs the FAR Council to take further action to prevent OCIs—was signed into law on December 27, 2022. [92] The Act provides little specificity, but directs that the FAR Council provide updated definitions, guidance, and examples of OCIs.[93] The Act requires that the FAR Council provide examples of OCIs involving private-sector clients.[94] Many argue that McKinsey's consulting for the FDA and pharmaceutical companies was not addressed by current OCI guidance because the guidance is unclear as to whether an OCI could arise from a government contractor's work for a private company—in McKinsey's case Purdue and other pharmaceutical companies—rather than the government contractor's work on another government contract.[95] Potential conflicts such as these were not specifically addressed in the original FAR OCI guidance because the federal Government had very few consulting and

[89] *Compare* DFARS; OCI in MDAPs (DFARS Case 2009-D015), 75 Fed. Reg. 20954 (proposed Apr. 22, 2010) *with* Department of Defense Federal Acquisition Regulation Supplement ("DFARS") Case 2009-D015). 75 Fed. Reg. 81908 (to be codified at 48 C.F.R. pt. 209 and 252). *See also* Metzger, *supra* note 18, at 5-7 (comparing the final rule with the originally proposed rule).
[90] *See, e.g.*, Metzger, *supra* note 18, at 1.
[91] *See* DAVID H. CARPENTER, CONG. RSCH. SERV., LSB10772, FEDERAL PROCUREMENT RESTRICTIONS ON ORGANIZATIONAL CONFLICTS OF INTEREST (2022) (discussing potential legislative solutions to address issues with the current FAR guidance on OCIs).
[92] Preventing Organizational Conflicts of Interest in Federal Acquisition Act, Pub. L. No. 117-324, 136 Stat. 4439 (2022).
[93] *Id.*
[94] *Id.*
[95] *McKinsey & Company's Conduct and Conflicts at the Heart of the Opioid Epidemic, Before H. Comm. on Oversight and Reform*, 117th Cong. (2022) (testimony of Jessica Tillipman, Assistant Dean for Government Procurement Law Studies, The George Washington University Law School).

personal service contracts at the time.[96] The FAR Council is also directed to provide executive agencies with solicitation provisions and contract clauses requiring contractor disclosure of information relevant to potential OCIs but prior to award and throughout performance.[97] The Act provides that agency executives will be able to tailor the solicitation provisions and contract clauses "as necessary to address risks associated with conflicts of interest and other considerations that may be unique to the executive agency."[98]

The passage of this Act is not enough to address the issue of outdated guidance. Rather, the FAR Council must follow the notice-and-comment rulemaking process to effectuate revisions to the FAR.[99] The ultimate withdrawal of the 2011 proposed solutions after a decade of inaction makes this follow-through all the more important.[100] This Note seeks to provide some potential solutions for the FAR Council, including a renewed focus on the distinction between competitive integrity and business risk OCIs, both in response to and beyond what is required by the Act.[101] While Congressional momentum in response to the McKinsey investigation has created an opportunity for reform, more specific solutions are needed.

II. The Problem: Outdated, Inadequate, and Unclear Guidance

The foregoing discussion explains how the modern federal workforce differs from what the drafters of the FAR anticipated in 1984. This Part explains why those differences create gaps that the current guidance fails to adequately address. Revised guidance that distinguishes between business risk and competitive integrity OCIs is needed to address these gaps.

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[96] For a discussion of government outsourcing see *supra* Section I.B.
[97] Preventing Organizational Conflicts of Interest in Federal Acquisition Act.
[98] *Id.*
[99] MANUEL, ET AL., *supra* note 77, at 11 (describing the process for amending the FAR.)
[100] *See supra* Section I.C.
[101] *See infra* Part III.

A. Current FAR Guidance is Outdated, Inadequate, and Unclear

Currently, the outdated OCI guidance in the FAR is inadequate in addressing the modern realities of the federal contracting. Further, the guidance is unclear, leaving contracting officers and contractors struggling with how such guidance should apply in a given situation. This section explains specifically how changes in the government contracting landscape have made the current guidance outdated, inadequate, and unclear.

i. Outdated and Inadequate Guidance

The gaps in the current OCI guidance in the FAR lead to both underdeterrence and overdeterrence. Specifically, the FAR's current guidance fails to address the role of subcontractors' conflicts of interest, does not recognize the complex business relationships created by outsourcing, and ignores the different types of risk that different OCI's impose.[102] In *Safal Partners, Inc.*[103] the protester, Safal Partners, Inc. ("Safal") challenged award of a contract for technical assistance services to Manhattan Strategy Group, LLC ("MSG"), whose subcontractor also held a contract with the same agency.[104] Safal alleged the subcontractor stood to benefit financially by recommending grantees under the subcontractor's existing contract for technical assistance provided by the subcontractor and MSG under the new technical assistance contract.[105] The contracting officer determined that this did not constitute an OCI because the agency retained authority to make determinations on technical assistance and the subcontractor merely provided recommendation.[106] However, the GAO disagreed, emphasizing the

[102] *See generally* FAR Subpart 9.5 (current guidance); *see also* Gordon, *supra* note 25, at 36-39 (describing the need for additional guidance regarding subcontractors); Nash, *supra* note 19 (discussing inadequacies within the current OCI framework).
[103] B-416937, 2019 CPD ¶ 20 (Jan. 15, 2019).
[104] *Id.*
[105] *Id.* at 9-10.
[106] *Id.* at 9-10.

subcontractor's inability to render impartial advice and sustained the bid protest.[107] The FAR currently provides no specific guidance on how an agency and prime contractor should address subcontractor conflicts of interest.[108] Yet, *Safal Partners, Inc.*, makes clear that such complex contracting relationships in management support and consulting contracts are a reality of modern contracting and updated FAR guidance on OCIs must build upon the GAO's focus on the contractor's ability to render impartial advice.[109]

While many aspects of the FAR lend significant deference to agency personnel, the FAR typically provides guidance on how this discretion should be exercised.[110] The FAR guidance regarding OCIs lacks this key feature, leaving contracting officers to resolve the issues themselves.[111] Adequate guidance should equip agency personnel with a framework to exercise this discretion in instances where OCIs pose a business risk to the Government through the potential for impaired contractor performance while also protecting against OCIs that threaten the integrity of the competitive process.

ii. Unclear Guidance

In addition to the substantive gaps, the FAR's OCI guidance is unclear. Courts and the GAO have addressed OCIs through a myriad of case law but, without updated FAR guidance,

[107] *Id.* at 9-10.
[108] *See generally* FAR Subpart 9.5.
[109] For another example of a bid protest involving subcontractor OCIs, see, e.g., *International Business Machines Corporation*, B-410639, et al., 2015 CPD ¶ 41, at 8 (Jan. 15, 2015) (denying the protester's challenge that it had been improperly excluded from a competition because key personnel of its proposed subcontractor, Booz Allen Hamilton, were involved in developing key acquisition strategies for the procurement).
[110] *See, e.g.*, FAR 15.101 (2022) (providing guidance to contracting officers on the "best value continuum" and how a tradeoff process or lowest price technically acceptable source selection process may be more or less appropriate depending upon Government needs); FAR Subpart 16.1 (providing guidance to contracting officers on selecting contract types).
[111] *See generally* FAR 9.5 (current guidance); *see also* Nash, *supra* note 19 (discussing inadequacies within the current OCI framework); Gordon, *supra* note 25 (describing gaps in the current OCI guidance).

agencies are left struggling to find centralized answers to complex OCI questions.[112] Between the definitions in FAR 2.101, the *Aetna* categories, the two underlying principles described in FAR 9.505, and the examples provided in FAR 9.508, the current guidance surrounding OCIs, is inaccessible and often unclear.[113] Each of these sources in the FAR and GAO case law provides a somewhat different answer to the questions of how an OCI is defined, what concerns OCIs are meant to address, and how agencies should analyze them.[114] This leaves both contractors and the Government without clear direction on how to handle the multitude of fact-specific contexts in which OCIs arise.[115]

As a result, contractors and the Government are unable to make predictions about how courts or the GAO might analyze a specific potential conflict. Courts and the GAO have emphasized the fact-specific nature of the potential conflicts and the need to handle OCI evaluations on a case-by-case basis which leaves interested parties unable to make informed decisions regarding potential conflicts.[116] Some argue that a risk-averse culture has led to the

[112] *See* discussion *supra* Section I.A. *Compare* FAR 2.101 (2023) (defining OCIs) *and* FAR 9.505 (2019) (describing OCI policy concerns and providing examples of OCI) *with Aetna Gov't Health Plans, Inc.*, B-254397, 95-2 CPD ¶ 129, at 11-12 (Comp. Gen. July 27, 1995) (categorizing OCIs as "biased ground rules," "unequal access to information," and "impaired objectivity"). *See also* Alan Chvotkin, *Stretching the Limits of FAR OCI Rules*, NICHOLS LIU (June 9, 2022), https://nicholsliu.com/stretching-the-limits-of-far-oci-rules/https://nicholsliu.com/stretching-the-limits-of-far-oci-rules/ (discussing the conceptual and practical limitations of the current FAR guidance).

[113] *See* sources cited *supra* note 112. For a discussion of the importance of uniformity in procurement law see Schooner, *supra* note 17, at 109 (describing the efficiency benefits of uniformity in the procurement system).

[114] FAR 2.101 (2023); FAR 9.505 (2019); *Aetna Gov't Health Plans, Inc.*, 95-2 CPD ¶ 129, at 11-12.

[115] *See, e.g.*, *NetStar-1 Gov't Consulting, Inc. v. United States*, 101 Fed. Cl. 511, 524 (2011), aff'd, 473 F. App'x 902 (Fed. Cir. 2012) (discussing how the contractor, the agency, the GAO, and the Court of Federal Claims all held differing understandings as to whether an OCI existed).

[116] *See, e.g., Axiom Resource Management, Inc. v. United States*, 564 F.3d 1374, 1382 (Fed. Cir. 2009) ("the FAR recognizes that the identification of OCIs and the evaluation of mitigation proposals are fact-specific inquiries that require the exercise of considerable discretion."); *see also Valdez International Corp.*, 2011 CPD ¶ 13, at 1 (Comp. Gen. Dec. 29, 2010) (citing *Axiom* in holding that the "contracting officer's determination that the awardee's contract performance would not pose an organizational conflict of interest (OCI) was reasonable"); *Guident Technologies, Inc.*, B-405112.3, 2012 CPD ¶ 166, at 7 (Comp. Gen. June 4, 2012) ("We review the reasonableness of the contracting officer's investigation and, where an agency has given meaningful consideration to whether a significant conflict of interest exists, we will not substitute our judgment for the agency's, absent clear evidence that the agency's conclusion is unreasonable."); *QinetiQ North America, Inc.*, B-405008, B405008.2, Jul. 27.

Government unnecessarily excluding offerors who do not actually pose a significant potential conflict of interest, thereby negatively impacting not only that disappointed offeror but also the taxpayer who may have benefited from that offeror's superior service or expertise as the best value for the Government.[117] Further, OCIs are a common protest ground because the effect of a sustained protest is often disqualification, rather than simply corrective action to re-evaluate all proposals.[118] Agencies can use waiver as a last minute measure to avoid a sustained bid protest or otherwise adequately addressing OCIs.[119] This allows agencies to circumvent the FAR's intent to protect the integrity of fair competition.[120] Thus, the current systems provides for both instances of under-deterrence and over-deterrence. This Note proposes a solution that stabilizes these extremes around the optimal level of deterrence.[121]

There is a need for additional clarity and a unified source of regulatory guidance on OCIs.[122] As Ralph C. Nash Jr. has stated "[s]ince the FAR Council has apparently made no effort

2011, 2011 CPD ¶ 154 ("the FAR expressly directs contracting officers to examine the particular facts associated with each situation, giving consideration to the nature of the contracts involved, and further directs contracting officers to obtain the advice of counsel and appropriate technical specialists before exercising their own sound discretion"); *L-3 Services, Inc.*, B-400134.11, Sept. 3, 2009, 2009 CPD ¶ 171 ("Because conflicts of interest may arise in situations not specifically addressed in FAR Subpart 9.5, individuals need to use common sense, good judgment, and sound discretion when determining whether a potential conflict exists.").

[117] *See* Schooner, *supra* note 17, at 109 ("[I]mproper obsession with risk avoidance can suffocate creativity, stifle innovation and render an institution ineffective."); Sec. Robert M. Gates, *Submitted Statement to Senate Armed Services Committee*, at 10 (Jan. 27, 2009) (describing a "risk-averse culture" as an example of "entrenched attitudes throughout the Government" which "are particularly pronounced in the area of acquisition.").

[118] *Guidehouse LLP*, B-419848.3, et al., 2022 CPD ¶ 197, at 2 (Comp. Gen. June 6, 2022) (sustaining bid protest that the awardee had a disqualifying OCI). *See* Daniel I. Gordon, *Bid Protests: The Costs are Real, but the Benefits Outweigh Them*, 42 PUB. CONT. L. J. 489, 510 (2013) (discussing a high number of sustained bid protesters related to OCIs).

[119] *See, e.g.*, *CACI, Inc., et al*., B-413860.4, et al, 2018 CPD ¶ 17, at 1 (Comp. Gen. Jan. 5, 2018) (denying a protest alleging that the agency's waiver was improper because the waiver was not issued until after award); *AT&T Government Solutions, Inc*., B-407720, et al., 2013 CPD ¶ 45 (Comp. Gen. Jan. 30, 2013) (dismissing a protest as academic when the agency waived the OCI after GAO's outcome prediction determined that the agency's ineligibility determination was unreasonable).

[120] *See* sources cited *supra* note 119 (providing examples of last minute waiver); discussion *supra* note 47 (describing the importance of competitive integrity).

[121] *See infra* Part III.

[122] *See* discussion *supra* Section I.A; FAR 2.101 (2023); FAR 9.505 (2019); *Aetna Gov't Health Plans, Inc.*, B-254397, 95-2 CPD ¶ 129, at 11-12 (Comp. Gen. July 27, 1995) (GAO's three categories).

to clarify the regulation, the primary guidance is in the decided cases . . . . That is not a happy state of affairs."[123] A prime example of this unhappy state of affairs is the case of *NetStar-1 Government Consulting, Inc. v. United States*.[124] There, the protester, NetStar-1 Government Consulting ("NetStar") and the awardee, ALON, Inc., ("ALON"), both had potential conflicts of interest because their work under other contracts with the same agency, Immigration and Customs Enforcement ("ICE"), gave them access to competitively useful documents.[125] ICE, pursuant to the Homeland Security Acquisition Regulation ("HSAR"), included a standard OCI clause specific to the Department of Homeland Security, that required contractors to either

> (i) certify that, to the best of their knowledge, they were not aware of any facts which create an actual or potential organizational conflict of interest (OCI) related to award of the contract; or (ii) include in its proposal all information regarding the OCI and provide a mitigation plan if the vendor believed that the OCI could be avoided or neutralized.[126]

Both NetStar and ALON certified that they were not aware of any facts which might create an actual or potential conflict of interest.[127] The Court of Federal Claims would later disagree in a decision affirmed by the Federal Circuit.[128]

The NetStar case shows how the lack of clarity in the current OCI guidance can lead to undesirable results and unnecessary costs and delay for both the Government and contractors. The agency initially awarded the contract to ALON on September 15, 2010.[129] The Federal Circuit did not affirm the Court of Federal Claims injunction until August 9, 2012.[130] Thus, the NetStar case is an example of how inadequate OCI guidance can lead to a period of multiple

[123] Nash, *supra* note 19, at 8.
[124] 101 Fed. Cl. 511 (2011), aff'd, 473 F. App'x 902 (Fed. Cir. 2012).
[125] *Id.*
[126] *Id.* at 515.
[127] *Id.* at 515.
[128] *Id.* at 520.
[129] *Id.* at 516.
[130] *Id.*

years where contracts are unperformed or enjoined.[131] Further, this case shows just how confused contracting officers, contractors, GAO, and the courts are by the current OCI guidance. First, neither contractor identified the potential OCI at the time of submitting their offer, and instead certified that they did not know of any fact giving rise to a potential OCI.[132] The contracting officer, with access to the offers and the existing ICE contracts, did not identify the potential conflict.[133] Then, once the conflict was identified by the GAO, the contracting officer simply approved the mitigation plans, without giving the conflict any meaningful consideration.[134] Finally, GAO would find there was no OCI and the Court of Federal Claims and Federal Circuit found the opposite.[135] The inconsistency in interpreting the ambiguities of the existing guidance is indeed an unhappy state of affairs.[136]

B. 2011 Proposed Solutions Are a Helpful Starting Point but More is Needed to Address the Current Inadequacies

While the 2011 solutions would have helped to address some of these gaps, the current realities of federal contracting are different than they were in 2011 and blanket adoption of the 2011 regulations would therefore be a mistake.[137] The FAR Council should consider how the 2011 proposed reforms can serve as a basis for updated guidance, but must also bear in mind the important changes in the field of federal procurement in the last decade.[138] The legislative debate

[131] It does appear that NetStar provided the services under the contract for some of the delay. *Id.* at 517, n. 7 ("NetStar, which was the incumbent on a prior related contract, provided the services in question under a bridge contract that expired September 28, 2011.").
[132] *Id.* at 515.
[133] *Id.* at 521.
[134] *Id.* at 526.
[135] *Id.* at 517.
[136] Nash, *supra* note 19, at 8.
[137] *See generally* Burd, *supra* note 18 (arguing that the 2011 OCI reforms are longer appropriate due to changes such as the *Turner Construction Co. v. United States*, 645 F.3d 1377, 1386 (Fed. Cir. 2011) "hard facts" decision, agencies embracing the authority to waive OCIs, more prevalent use of OCI-specific contract terms and conditions, and defense industry spin-offs).
[138] *See supra* Section I.B (describing increased government outsourcing)

preceding the passage of the recent Preventing OCIs Act indicates that Congress intended for the FAR Council to pick up where the 2011 proposed rules left off.[139] Specifically, Senator DeSaulnier, referred to the 2011 proposed rules and explained the Preventing OCIs Act "requires the revisions that were then started to be completed."[140]

Although the distinction the 2011 proposed rule makes between OCIs that impact Government business risks and those that impact the fairness of the competitive process is well-founded, one important aspect of the 2011 proposed reforms that has received much debate is the proposal to move OCI guidance form FAR Part 9 Contractor Qualifications to FAR Part 3 Improper Business Practices and Personal Conflicts of Interest.[141] Commentators argued that the 2011 proposed reforms were contradictory in this aspect, as this move from FAR Part 9 to Part 3 implies that OCIs should be analyzed under an anticorruption framework but the other aspects of the proposed rule focus on the implication that OCIs are not necessarily corrupt.[142] A revised solution needs to adequately reconcile these two competing assumptions.

III. The Solution: Updated, Adequate, and Clear Guidance

To address the current confusion and undesirable outcomes of the FAR's guidance on OCIs, the FAR Council should revise the FAR to include adequate guidance that equips contracting officers with the necessary tools to navigate the complex OCI landscape that is the reality of modern contracting. While the Preventing OCIs Act requires that the FAR Council revise the FAR's OCI guidance, the statute offers very little specific guidance.[143] This Part

[139] Preventing Organizational Conflicts of Interest in Federal Acquisition Act, Pub. L. No. 117-324, 136 Stat. 4439 (2022).
[140] 168 CONG. REC. H9837-01 (2022) (statement of Sen. DeSauliner).
[141] Federal Acquisition Regulation; Organizational Conflicts of Interest, 76 Fed. Reg. 23,236 (Apr. 26, 2011). For a discussion of this proposed change see Yukins, *supra* note 36, at 2-4; Jurich, *supra* note 58, at 251.
[142] Yukins, *supra* note 36, at 3.
[143] Preventing Organizational Conflicts of Interest in Federal Acquisition Act. *See supra* Section I.C.

proposes specific solutions that the FAR Council should adopt to respond to the concerns with the current OCI guidance identified both in this Note and in the Congressional action leading up to the Act.

These solutions, however, are provided under the assumption the FAR Council will, at a minimum, also provide the necessary standard provisions and clauses mandating contractor disclosure of potential OCIs and updated definitions and examples required by the Preventing OCIs Act.[144] These standard provisions and clauses are essential to ensuring contractor disclosure of potential conflicts and the following proposed solutions rely upon such disclosure to effectively address OCIs. Without mandatory disclosure by contractors, both early in the competitive process and throughout the performance of the contract, agencies will be unable to effectively identify and address significant potential conflicts of interest.[145] Provisions and clauses requiring mandatory disclosure by contractors are therefore essential to the vitality of revised OCI guidance. Importantly, as the Act recognizes, these provisions and clauses should be tailored by the contracting officer in each case to account for the nuances of the particular procurement.[146] As a practical matter, ongoing mandatory disclosure may impose burdens upon the contractor but the contractor, rather than the government, is in the best position to identify and disclose potential conflicts of interest for two reasons. First, there may be instances where the information necessary to identify the conflict is solely within the possession of the contractor. For example, the Government would be less likely than McKinsey to have the necessary information to identify the potentially conflicting work resulting from McKinsey's consulting with large pharmaceutical companies.[147] Second, many large consultant firms and similar

[144] Preventing Organizational Conflicts of Interest in Federal Acquisition Act.
[145] *See infra* Section III.A.
[146] Preventing Organizational Conflicts of Interest in Federal Acquisition Act.
[147] *See supra* notes 2-11 and accompanying text.

businesses already have large and complex monitoring systems for conflicts of interest, similar to large law firms.[148] These baseline provisions required by the Act establish the foundation for this Note's proposed guidelines."

The updated guidance should first identify the distinction between conflicts of interest that pose a business risk to the Government ("business risk OCIs") and those that threaten the fairness of the competitive process ("competitive integrity OCIs"). Second, the updated guidance should separate the two types of OCIs by moving guidance for competitive integrity OCIs to FAR Part 6, Competition Requirements, and keeping business risk OCIs in FAR Part 9, Contractor Qualifications. Finally, the updated guidance should presumptively prohibit waiver of competitive integrity OCIs while providing agencies with guidance in performing the tradeoff between business risk and expertise in business risk OCIs. This Part discusses these proposed solutions in more detail.

A. Distinguishing Between Business Risk and Competitive Integrity OCIs

Revised FAR guidance should distinguish between OCIs that involve concerns of Government business risk and OCIs that involve concerns of risk to the integrity of the competitive process because these concerns implicate different risk and therefore can be mitigated, or waived, differently. This is similar to the distinction proposed by the 2011 solutions, and reflected in FAR 9.505's statement of guiding principles for OCI regulation.[149] The Preventing OCIs Act[150] directs the FAR Council to provide definitions of the *Aetna*

[148] *See, e.g.*, *Codes of Professional Conduct*, MCKINSEY & CO., https://www.mckinsey.com/about-us/social-responsibility/code-of-conduct (last visited Apr. 6, 2023).
[149] Federal Acquisition Regulation; Organizational Conflicts of Interest, 76 Fed. Reg. 23,236 (Apr. 26, 2011). *See* Jurich, *supra* note 58, at 251 (discussing the proposed rule's distinction); FAR 9.505 (2019) (defining the two "underlying principles" of OCI policy as "[p]reventing the existence of conflicting roles that might bias a contractor's judgment" and "[p]reventing unfair competitive advantage").
[150] Preventing Organizational Conflicts of Interest in Federal Acquisition Act.

categories,[151] which are not currently mentioned in the FAR.[152] Revised FAR guidance should define these categories in a manner that gives effect to the FAR's core distinction between and OCIs that only pose a business risk to the Government, traditionally impaired objectivity OCIs, and OCIs that threaten the integrity of the competitive process, traditionally biased ground rules and unequal access to information OCIs.[153] These two different concerns should lead to different treatment by agencies because business risk OCIs impact primarily the Government's interests whereas OCIs that involve risks of unfair competition impact the interests of other offerors, in addition to the Government's interests.[154] While most OCIs involve a conflict between two or more government contracts like NetStar,[155] in OCIs that involve a conflict with a contractor's private sector contract, such as McKinsey's conflict,[156] there may be impacts of a business risk OCI upon the interests of the other party to the contractor's private-sector contract as well.[157] These third-party interests, such as those of the large pharmaceutical companies in the McKinsey case, could be considered as part of the Government's interests for the purposes of OCI analysis. For example, in the McKinsey case, the FDA could have considered its interest in successful contract performance as well as the potential broader effects through any influence McKinsey's simultaneous contracting may have through performance of the contracts with pharmaceutical companies. These third-party concerns, however, would be best addressed between the contractor and the third-party.

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[151] *Aetna Gov't Health Plans, Inc.*, B-254397, 95-2 CPD ¶ 129, at 11-12 (Comp. Gen. July 27, 1995).
[152] *See supra* Section I.A.
[153] FAR 9.505 (2019).
[154] For a discussion of these two different concerns see Christopher R. Yukins, *supra* note 36, at 4.
[155] *See NetStar-1 Gov't Consulting, Inc. v. United States*, 101 Fed. Cl. 511 (2011), aff'd, 473 F. App'x 902 (Fed. Cir. 2012); *supra* notes 124-135.
[156] *See supra* notes 2-6 and accompanying text; STAFF OF H. R. COMM. ON OVERSIGHT AND REFORM, *supra* note 1.
[157] *See supra* notes 2-6 and accompanying text; STAFF OF H. R. COMM. ON OVERSIGHT AND REFORM, *supra* note 1.

Specifically, business risk OCIs involve the Government's competing interests between the business risk of biased advice and the benefit of the contractor's expertise through additional experience, as recognized in FAR 9.505(a)'s underlying principle of "[p]reventing the existence of conflicting roles that might bias a contractor's judgment".[158] Competitive integrity OCIs do not, however, involve such competing interests. Rather, the conflict that arises when a contractor has unequal access to competitive information or is involved in the creation of the acquisition strategy for a contract that same contractor is competing for, does not directly implicate the Government's business risk in receiving biased advice.[159] Competitive integrity OCIs address the FAR's second underlying principle of "[p]reventing unfair competitive advantage."[160] The negative impact is directly on the fairness of the competitive process because the competitor with the unequal information or involvement in the acquisition support has an undue advantage in competing for the contract.[161] Further, there is typically no benefit of added expertise that arises directly from the conflict when the conflict is one of competitive integrity.[162] While it may still be the case, in some instances, that the offeror with a competitive integrity OCI is otherwise the best value for the government, this will not systematically be true, as with business risk OCIs where the conflict arises out of the specific experience that the government is seeking in this sector.[163]

For example, under this Note's proposed solution, McKinsey's conflict of interest in performing work for the FDA and large pharmaceutical companies would be categorized as a

[158] FAR 9.505(a) (2019).
[159] For an example see the *NetStar-1 Gov't Consulting, Inc.*, 101 Fed. Cl. 511, case discussed *supra* notes 124-135.
[160] FAR 9.505(b) (2019).
[161] *Id.*
[162] For an example see *NetStar-1 Gov't Consulting, Inc. v. United States*, 101 Fed. Cl. 511.
[163] *See supra* note 18 and accompanying text.

business risk OCI.[164] McKinsey's conflict gave McKinsey no undue advantage that threatened the integrity of the competitive process.[165] Rather, the threat was to the Government in receiving biased consulting services that undermined successful contract performance.[166] There are competing concerns between this potential business risk and the benefit to the Government of McKinsey's experience in this sector.[167] This Note proposes that this concern should be treated differently from a concern regarding the integrity of the competitive process because the Government is in a better position to address the competing concerns raised in a business risk OCI.[168]

Conversely, ALON's conflict of interest in the *NetStar* case would be categorized as a competitive integrity OCI under this Note's proposed solution because that OCI arose from ALON's unequal access to competitive information that gave ALON an undue advantage in competing for the contract.[169] This threat to competitive integrity does not pose any concurrent business risk to the Government but is a violation of the procurement system's core requirement of full and open competition.[170] OCIs that only provide an undue competitive advantage are particularly sensitive because it is not the Government's own interests as a consumer that are at stake, but rather the interests of other offerors in having a fair opportunity to compete for the resulting contract.[171]

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[164] *See supra* notes 2-6 and accompanying text; STAFF OF H. R. COMM. ON OVERSIGHT AND REFORM, *supra* note 1, at 3-5.
[165] *See supra* notes 2-6 and accompanying text; STAFF OF H. R. COMM. ON OVERSIGHT AND REFORM, *supra* note 1, at 40.
[166] *See supra* notes 2-6 and accompanying text; STAFF OF H. R. COMM. ON OVERSIGHT AND REFORM, *supra* note 1, at 40.
[167] *See supra* note 18 and accompanying text.
[168] *See infra* Section III.C.
[169] *See supra* notes 127-129 and accompanying text; *NetStar-1 Gov't Consulting, Inc. v. United States*, 101 Fed. Cl. 511, 520 (2011), aff'd, 473 F. App'x 902 (Fed. Cir. 2012).
[170] *NetStar-1 Gov't Consulting, Inc*, 101 Fed. Cl. at 520.
[171] *See supra* notes 42-49 and accompanying text.

Importantly, not all conflicts of interest will fit neatly into these categories. In fact, as with the current *Aetna*[172] categories, many conflicts of interest will pose a risk both to the Government's business interests and to the competitive process.[173] This solution does not ignore this overlap. Under this proposal, any conflict of interest that poses any risk of competitive integrity is a competitive integrity OCI, regardless of whether there is also concurrent business risk to the Government. A business risk OCI must be a conflict that *only* poses business risk to the Government without any concurrent risk of undue advantage in the competitive process. In other words, a business risk OCI may not also pose a risk to competitive integrity, but a competitive integrity OCI may or may not also involve concurrent business risk. For example, under this proposed framework, the OCI in *The Jones/Hill Joint Venture*,[174] where the awardee consulted on the drafting of the performance work statement and then prepared the management plan for in-house performance, would be considered a competitive integrity OCI because both unequal access to information and biased ground rules OCIs pose a risk to the fairness of the competitive process rather than a risk of unsuccessful contract performance due to contractor bias.[175]

A business risk OCI, such as the McKinsey case, may initially seem to be most concerning given that business risk OCIs may lead to a risk of biased contract performance. The Government, however, is in a better position to accept the risks of a business risk OCI.[176] Unlike

[172] *See supra* notes 24-25 and accompanying text.
[173] *See, e.g.*, *The Jones/Hill Joint Venture*, B- 286194.4 et al, 2001 CPD ¶ 194 (Comp. Gen. Dec. 5, 2001), at 10, modified on reconsideration by *Dep't of the Navy—Reconsideration*, B-286194.7, 2002 CPD ¶ 76 (Comp. Gen. May 29, 2002) ("the record is consistent with the circumstances attendant to both "unequal access to information" and "biased ground rules" conflicts of interest.").
[174] B- 286194.4 et al, 2001 CPD ¶ 194 (Comp. Gen. Dec. 5, 2001), modified on reconsideration by *Dep't of the Navy—Reconsideration*, B-286194.7, 2002 CPD ¶ 76 (Comp. Gen. May 29, 2002)
[175] *Id.* at 10.
[176] *See* Hilary S. Cairnie & Dena S. Kessler, *Organizational Conflicts of Interest*, 12-13 BRIEFING PAPERS 1, 14 (Dec. 2012) (discussing how the 2011 proposed rules "expressly contemplate agency acceptance of risk due to a conflict"); Yukins, *supra* note 36, at 4 (discussing the 2011 proposed rule's approach to impaired objectivity OCIs).

competitive integrity OCIs, which primarily affect the procurement system's core focus of full and open competition, business risk OCIs involve a risk of unsuccessful contract performance, similar to other risks that the Government expressly accepts and rejects through selection of a best-value tradeoff.[177] The interest in competitive integrity is distinct in that it involves the interests of both the Government and the contractor. Further, the procurement system places a high value on competitive integrity because of the theory that doing so will yield the best value for the Government through the forces of the competitive market.[178] If this core policy goal of competitive integrity is undermined it will hinder the Government's ability to obtain the best value.[179] Importantly, for the Government to be able to fully evaluate the potential risk of unsuccessful contract performance, the mandatory disclosure provisions and clauses required by the Preventing OCIs Act are essential.[180] These provisions and clauses ensure that the Government has the necessary information regarding a potential OCI, especially when that information is entirely within the control of the contractor.[181] Once the Government has access to such information, the Government can evaluate the potential risk of unsuccessful contract performance to determine whether mitigation or waiver is in the Government's interest.[182] If the risk is to competitive integrity, and not to unsuccessful contract performance, such as in a

[177] *See generally* FAR Part 15 Contracting by Negotiation. For a discussion of the importance of full and open competition in the procurement system see *supra* notes 46-48 and accompanying text.
[178] *See* Schooner, *supra* note 17, at 104 (describing competition, as a core principle of the U.S. procurement system and explaining that such a principle is based upon Adam Smith's theory that individuals pursuing their self-interest in the marketplace will result in better outcomes for all market participants) (citing Adam Smith, *The Wealth of Nations* (ed. Edwin Canaan, University of Chicago Press, 1976)).
[179] *Id.* at 104; *see supra* notes 46-48 and accompanying text.
[180] Preventing Organizational Conflicts of Interest in Federal Acquisition Act, Pub. L. No. 117-324, 136 Stat. 4439 (2022).
[181] *See supra* notes 60-63 and accompanying text (discussing the current guidance regarding solicitation provisions and contract clauses that address OCI disclosure); STAFF OF H. R. COMM. ON OVERSIGHT AND REFORM, *supra* note 1, at 34-49 (discussing McKinsey's failure to disclose its potential conflicts); *NetStar-1 Gov't Consulting, Inc. v. United States*, 101 Fed. Cl. 511, 520-524 (2011), aff'd, 473 F. App'x 902 (Fed. Cir. 2012) (stating that the agency should have required the contractor to disclose additional information in order to identify the potential conflict earlier).
[182] *See* Yukins, *supra* note 36, at 4; *infra* Section III.C.

competitive integrity OCI, the individual agency is not in a position to undermine the procurement's system core requirement of full and open competition in the same way it can accept a risk of unsuccessful contract performance that is in the Government's best interest.[183] Therefore, revised guidance should distinguish between OCIs that pose a risk to successful contract performance and those that threaten the integrity of the competitive process.

B. Where in the FAR?

In addition to distinguishing between business risk OCIs and competitive integrity OCIs, revised FAR guidance should address the issue of where such guidance is placed within the FAR, as was raised in the 2011 proposed solutions.[184] Specifically, the FAR Council should move competitive integrity OCIs to FAR Part 6,[185] which addresses Competition Requirements, and keep business risk OCI guidance in FAR Part 9,[186] which addresses Contractor Qualifications. This difference in FAR placement represents the different concerns among competitive integrity and business risk OCIs.[187] Competitive integrity OCIs are a matter of competition because the contractor's undue competitive advantage threatens CICA's core requirement of full and open competition.[188] Business risk OCIs—which primarily involve a risk of unsuccessful contract performance through the provision of biased advice—are best understood as a matter of contractor qualification.[189] This is because the Government is in the best position to determine, based upon information disclosed by the contractor, as required by the updated clauses the Preventing OCIs Act direct the FAR to include, whether—despite the

[183] *See* Yukins, *supra* note 36, at 4; *infra* Section III.C.
[184] *See supra* notes 141-142 and accompanying text; Yukins, *supra* note 36, at 3.
[185] FAR Part 6 Competition Requirements.
[186] FAR Part 9 Contractor Qualifications.
[187] *See* Yukins, *supra* note 36, at 1-2 (explaining how OCIs grew out of a concern for unequal access to information but have since shifted to impaired objectivity OCIs).
[188] 41 U.S.C. § 3301.
[189] *See* FAR 9.000 (2022) (describing the role of FAR Part 9).

conflict—the contractor is still qualified to perform the contract successfully.[190] Moving FAR guidance that directly implicates competitive concerns to Part 6, and maintaining FAR guidance that involves business-type determinations by the Government in Part 9, will ensure that agencies are approaching different types of OCIs with the correct approach based upon the different issues that are being considered.

C. To Waive or Not to Waive?

In addition to these changes, revised FAR guidance should allow agency personnel to exercise their business judgment in determining whether to waive a business risk OCI but should presumptively prohibit waiver of competitive integrity OCIs. This is because the Government, as the purchaser, and recipient of the product or service, is able to accept a certain level of business risk in exchange for superior expertise or experience when evaluating a business risk OCI.[191] However, the Government should not waive OCIs that pose a risk to competitive integrity because CICA's requirement of full and open competition is too central to the U.S. procurement system to waive in individual conflicts absent unusual and compelling circumstances.[192] The procurement system places an extraordinarily high value on full and open competition because of the central capitalist theory that individuals zealously pursuing their own self-interests in a competitive market will result in better outcomes for all market participants.[193]

To assist agencies in addressing OCIs, revised FAR provisions should include the following guidance in determining whether waiver of a business risk OCI is in the Government's

[190] For a discussion of the risks of "impaired objectivity OCIs" see Yukins, *supra* note 36, at 4.
[191] Cairnie & Kessler, *supra* note 176, at 14.
[192] 41 U.S.C. § 3301; *see supra* notes 46-48 and accompanying text (discussing the importnace of competitive integrity to the procuremetn system).
[193] 41 U.S.C. § 3301; *see supra* notes 46-48 and accompanying text (discussing the importnace of competitive integrity to the procuremetn system).

best interest. The FAR should direct agency personnel to balance the impact of the potential conflict on the risk of unsuccessful contract performance with the benefit provided by the potentially conflicted contractor's business expertise, experience, or technical solution. If the benefit of the contractor's expertise, experience, or technical solution exceeds the risk of unsuccessful contract performance created by the potential conflict, then the agency should waive the OCI. Whereas, if the risk exceeds the benefit of the expertise, then the agency should not waive the OCI and the contracting officer should use other tools to avoid, neutralize, or mitigate, the conflict.

The guidance should also provide the agency with factors to consider in analyzing whether waiver of a business risk OCI is in the Government's best interest. Such factors should include the context and impact of the potential conflict, whether other contractors who may not have similar conflicts possess the requisite experience and expertise, as well as the type of contract and the impact impaired objectivity may have on successful contract performance. These factors should be illustrative, rather than exclusive and should provide the agency with tools for exercising discretion rather than overriding such discretion. The guidance should require that agencies document their waiver decision.

Thus, where there appears to be a conflict but the potential for unsuccessful performance is low, the contracting officer may exercise discretion to waive the conflict. Similarly, if there is a substantial risk but an opportunity for mitigation, the contracting officer could waive and mitigate the conflict. Notably, in many instances, such as McKinsey's headline grabbing potential conflict, the conflict will still be too serious and the impact too great for the contractor

to do so, but the Government is in the best position to make such a determination.[194] However, mandatory disclosure is therefore even more important in making contracting officers aware of potential conflicts and allowing them to adequately evaluate and address them.[195]

In a case like *Safal Partners, Inc.*, where the initial awardee's subcontractor had a potential conflict in that it could financially benefit by recommending grant recipients to the program it administered under another contract with the agency, the Government may be able to accept such a risk of unsuccessful performance.[196] While this analysis necessarily depends on the facts and circumstances of each case, in applying the above factors, the contracting officer could determine that the contractor's expertise and experience on this subject outweighs the minimal risk of unsuccessful contract performance, especially considering the attenuated subcontracting relationship as well as the fact that the agency retains final decisional authority.[197] The agency could also determine that the opportunity for firewalls and other mitigation techniques could present an opportunity for mitigating any potential conflict.[198] OCI guidance that allows for a discretionary approach to the different risks posed by different types of OCIs and provides guidance to contracting officers on how to exercise such discretion, is needed to address the complexities of modern federal acquisitions.

Conversely, the FAR guidance should establish a rebuttable presumption that competitive-integrity conflicts are non-waivable. Given that waiver of competitive integrity conflicts would essentially waive CICA's core requirement of full and open competition,[199] such

[194] *See* STAFF OF H. R. COMM. ON OVERSIGHT AND REFORM, *supra* note 1, at 40-50 (discussing how McKinsey's conflict of interest influenced policy documents submitted to Government agencies).
[195] *See* discussion *supra* note 181 (explaining the importance of mandatory disclosure).
[196] *Safal Partners, Inc.*, B-416937, 2019 CPD ¶ 20, at 9-10 (Jan. 15, 2019); *see supra* notes 103-107 and accompanying test.
[197] *Safal Partners, Inc.*, 2019 CPD ¶ 20, at 9-10.
[198] *See supra* note 57 and accompanying text (discussing mitigation of OCIs).
[199] 41 U.S.C. § 3301.

conflicts should not be waived lightly. Given that a bright-line rule may not account for the facts and circumstances of each individual case, the presumption of non-waiver should still be rebutted if there is an unusual and compelling reason,[200] approved by a senior agency official, and documented through a determination and findings. Therefore, the *NetStar* conflict, likely could not be waived because the awardee's access to nonpublic competitively useful information gave it an undue competitive advantage that undermines the procurement system's core focus on full and open competition.[201] This framework will equip agencies to exercise discretion in cases where only the Government's business interests are implicated while preserving contractors' interest in a fair competitive process.[202]

Conclusion

Current OCI guidance is outdated and inadequate. Without updates that reflect the modern realities of a "blended workforce" contractors and the government are left figuring it out themselves. This situation has led to over-deterrence of potential conflicts that could have been waived or mitigated and under-deterrence of potential conflicts that are either not identified or are waived. Congress, reacting to headlines of McKinsey's potential conflicts, has directed the FAR Council to issue revised guidance. A deeper review of the potential conflicts that arise daily but draw little attention reveals that the issues resulting from outdated and inadequate guidance are much more nuanced. It is first essential that the FAR Council avoid the inaction resulting from the 2011 solutions and enact revised guidance that provides a clear framework for

[200] While the guidance need not provide an exhaustive list of all potential reasons examples might include there being only one responsible source to meet the Government's needs or a mandatory source under the AbilityOne or similar program. *See* FAR 6.302-1 (2015) (providing guidance for when there is "[o]nly one responsible source and no other supplies or services will satisfy agency requirements."); FAR Part 8 (discussing mandatory sources).
[201] *See NetStar-1 Gov't Consulting, Inc. v. United States*, 101 Fed. Cl. 511 (2011), aff'd, 473 F. App'x 902 (Fed. Cir. 2012); *supra* notes 124-135 and accompanying text.
[202] *See supra* Section I.A (discussing these two distinct concerns).

contracting officers and mandatory disclosure requirements. In adopting such a framework, the FAR Council should effectuate the core distinction between competitive integrity and business risk OCIs. This proposed solution would ensure contracting officers are equipped to obtain the best value for the government and avoid the issues of both over and underdeterrence in current OCI guidance.

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The following writing sample is a memorandum I prepared for a Board Judge as part of my externship with the U.S. Civilian Board of Contract Appeals (CBCA). The CBCA hears disputes between government contractors and civilian federal executive agencies pursuant to the Contract Dispute Act, 41 U.S.C. §§ 7101-7109. This memorandum analyzes the applicability of various clauses to a dispute over a delay in a construction contract and was prepared to assist a Board Judge in preparing for mediation between the parties. The Board Judge has given me permission to use this memorandum in its redacted form as a writing sample. I did not receive assistance in preparing this memorandum and the work is entirely my own.

UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MEMORANDUM

To: Board Judge

From: Ethan Syster

Date: September 30, 2022

Subject: *[Contractor] v. [U.S. Agency]*, CBCA XXXX

Question(s) Presented

Whether the contractor is entitled to the costs it claims under either the Administrative Leave clause or the Suspension of Work clause?

Brief Answer

The contractor is not entitled to costs under either the Administrative Leave clause or the Suspension of Work clause because the facts do not indicate that the Government's action or inaction led to an order to suspend work or to the granting of administrative leave. The only likely claim for costs would be under a constructive acceleration theory arising from the Excusable Delays clause but this is also not a strong claim because the contractor has not shown any refusal to grant an extension or other coercive pressure by the Government

Background

On, October 7, 2015, [Contractor] was awarded a fixed-price construction contract to build a [government building].[1] Appellant's Notice of Appeal, Claim XX at 1 (hereinafter "Claim XX"). The contracting officer issued a Limited Notice to Proceed on February 26, 2016, with a 30-month Period of Performance and a Contract Substantial Completion Date of August 26, 2018. *Id.* at 1.

A security alert was issued on October 19, 2017, related to civil unrest near the worksite. Claim XX, Reference 01. That afternoon, [Contractor]'s employees at the worksite were dismissed early due to the security concerns. Claim XX at 1. The parties dispute who ordered the early release and shutdown of the worksite, but a "Site Event Report" prepared by [Contractor]'s construction security manager summarizes the decision-making process. The security manager explains that at 16:00 the "looters were next to our site." Exhibit 8. Following gunfire, "the decision was made by the Project Director to stop the work . . . and bring the workers down to the ground level." *Id.* Around 16:40, the security manager ensured the area was clear so that employees could be safely evacuated. *Id.* All employees were offsite at 17:27. *Id.* The workday typically ends at 18:00. Exhibit 7 at 3. A project manager of a subcontractor expressed concern that, if the decision to leave the worksite early was made by [Contractor], rather than the Government, "idle resources may not be compensable." *Id.* The security manager responded with the Site Event Report and explained in the body of the email "while the decision was made by [project manager] and I, there was coordination with [the agency]." Exhibit 7 at 2.

While not explicitly addressed in the claim or the contracting officer's final decision, it can be inferred that [Contractor] employees resumed work at their regularly scheduled time on the morning of October 20, 2017. Later on the morning of October 20, the contracting officer's representative ("COR") emailed [Contractor]'s project manager "FYI-We are following Security guidance and closing the site at 11:00." Claim XX, Reference 02. The project manager responded "Acknowledged. [Contractor] reserves its right to claim ½ day lost time due to civil unrest." *Id.* To which the COR responded with "it is your right in accordance with the contract." *Id.*

[Contractor] submitted a claim for $XX,XXX as direct and indirect costs resulting from the "[G]overnment-ordered site shut-down and administrative leave." Claim XX.

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[1] Dates and party names have been altered to preserve confidentiality.